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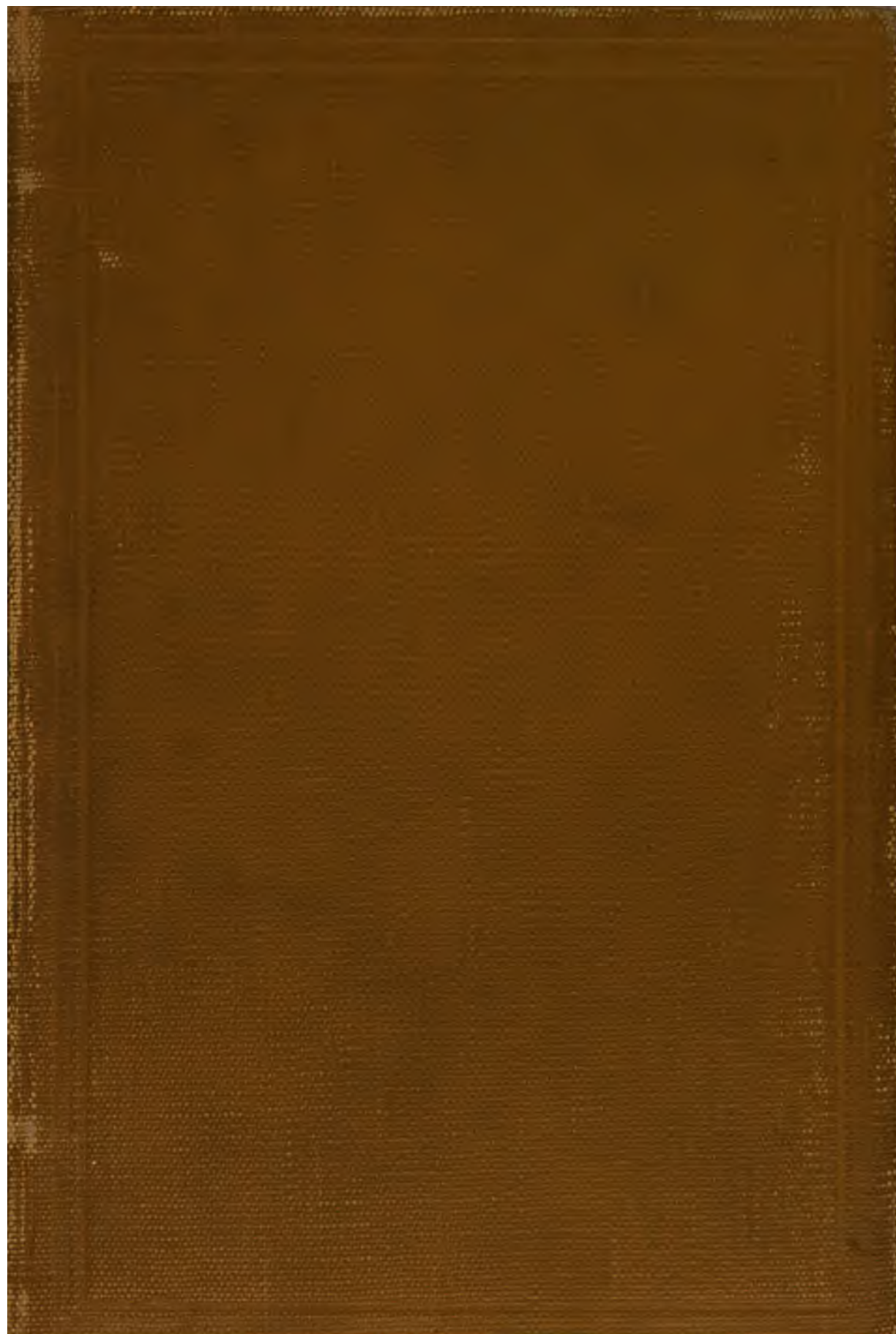
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22  
22  
42

















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LAW OF DAMAGES

By WILLIAM B. HALE, LL. B.  
AUTHOR OF "BAILMENTS AND CARRIERS"

SECOND EDITION

By ROGER W COOLEY  
PROFESSOR OF LAW, UNIVERSITY OF NORTH DAKOTA  
AUTHOR OF "BRIEFS ON THE LAW OF INSURANCE," "ILLUSTRATIVE CASES  
ON DAMAGES," "ILLUSTRATIVE CASES ON INSURANCE," AND "ILLUS-  
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## PREFACE TO SECOND EDITION

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IN recent years there have been no great changes in the law of damages. There has been but a slight development, except, possibly, in a few phases of the law, such as the allowance of damages for mental suffering, and in the rules applicable when the damage is caused by permanent structures. Even in these branches of the law there has been a crystallization of judicial thought, rather than an evolution. There may be noticed a somewhat more liberal view running through the decisions as to the elements of compensation, but this has little to do with the principles underlying the allowances. Such development as there has been is but a reflection of changed social and economic conditions.

In this second edition of Mr. Hale's work, it has not been thought necessary to make many changes in the original text. Here and there it has seemed advisable to make some changes and additions for the sake of clearness, or to emphasize the modern view. Recent cases have been added to the citations. Of course no attempt has been made to cite exhaustively, but simply to illustrate the more recent applications of the fundamental principles of the law of damages.

ROGER W. COOLEY.

UNIVERSITY OF NORTH DAKOTA, March 1, 1912.

(v)



## PREFACE TO FIRST EDITION

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THE author's object in the present work, the preparation of which has occupied a large portion of his time and attention for a period of nearly two years, has been to state, explain, and illustrate with elementary clearness and accuracy all the rules and principles governing the award of damages in civil cases. In view of the limitations of space in a one-volume work, it has been thought best to give the greater prominence to the discussion of the general principles underlying the whole subject, letting the application of those principles to special classes of cases fall into a subsidiary place. Another reason for this arrangement is that the book is intended as much for the use of students as of practitioners, and for that purpose it is absolutely essential that the general and controlling principles of the subject should be fully and clearly explained. These are few, and are easily grasped when explained in logical and connected order; but when presented with a mass of details applicable only to the special case under discussion the difficulties of the subject are largely increased. Much confusion has also been caused by the loose and unscientific use of terms both by law writers and in judicial opinions. This is notably true with regard to nominal damages. That subject has been made almost unintelligible by the lack of consistency and precision in the use of the terms "wrong" and "damage." The notions embraced in these words have been very carefully analyzed in the first chapter. The fundamental nature of legal rights and wrongs has been looked at from a new point of view; and while no new theories are advanced, it is hoped that the subject has been made clearer. The question of damages in actions for injuries to land by the erection of permanent structures, upon which the courts are almost hopelessly con-

fused, has also been looked at from the point of view established in the first chapter, and it is hoped that the results there reached will be helpful. This systematic examination of the principles of damages with reference to fundamental notions has been followed throughout the work. In connection with each principle discussed, numerous illustrations have been given to show its various applications. By means of the index and the careful analysis of the subject in the table of contents reference to any desired point is made easy.

In conclusion, the author wishes to acknowledge his very substantial obligation to Mr. Tiffany's excellent treatises on "Sales" and "Death by Wrongful Act." Very free use has been made of these works in the chapters on those subjects. The writer also desires to express his thanks and appreciation of much kind assistance and valuable advice from Mr. E. A. Jaggard.

July 1, 1896.

W. B. H.

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# TABLE OF CONTENTS

---

## CHAPTER I

### DEFINITIONS AND GENERAL PRINCIPLES

Sections		Pages
1.	Definition and Nature.....	1-3
2.	The Theory of Damages.....	4-8
3.	Wrong and Damage.....	9-15
4.	Lawful and Unlawful Conduct.....	15
5.	Authorized Conduct.....	15-19
6-7.	Forbidden Conduct.....	20-24
8-11.	Conduct Neither Authorized Nor Forbidden..	24-27
12.	Analysis of Legal Wrongs.....	28
13-14.	Classification of Damages.....	28

## CHAPTER II

### NOMINAL DAMAGES

15-17.	Definition and General Nature.....	29-38
--------	------------------------------------	-------

## CHAPTER III

### COMPENSATORY DAMAGES

18.	Definition .....	39-41
19-20.	Proximate and Remote Consequences in General..	42-43
21.	Direct and Consequential Losses.....	43-44
22-23.	Direct Losses.....	44-48
24-25.	Consequential Losses.....	48
26.	Proximate and Remote Consequential Losses .....	48-63
27.	Compensation for Consequential Losses..	63-65
28.	Consequential Damages for Torts.....	65-67
29.	Consequential Damages for Breach of Contract .....	68-87
30.	Avoidable Consequences.....	87-99
31.	The Required Certainty of Damages.....	99-103
32.	Profits or Gains Prevented.....	103-112
33.	Entirety of Demand.....	113-115
34.	Time to Which Compensation May Be Recovered —Past and Future Losses.....	115-128



Sections		Pages
35-36.	Elements of Compensation.....	128-129
37.	Pecuniary Losses.....	129-137
38-39.	Physical Pain and Inconvenience.....	137-140
40-41.	Mental Suffering.....	140-173
42.	Aggravation and Mitigation of Damages.....	173-182
43-45.	Reduction of Loss.....	183-188
46.	Injuries to Limited Interests.....	189-193

## CHAPTER IV

### BONDS, LIQUIDATED DAMAGES, AND ALTERNATIVE CONTRACTS

47.	Penal Bonds.....	194-195
48-50.	Liquidated Damages and Penalties.....	196-200
51-60.	Rules of Construction.....	200-220
61.	Alternative Contracts.....	220-222

## CHAPTER V

### INTEREST

62.	Definition .....	223-224
63.	Interest as a Debt and as Damages.....	224-232
64.	Interest as Damages—General Rule.....	232-233
65.	Interest on Nonpecuniary Losses.....	233-234
66.	Pecuniary Losses—Liquidated Demands....	235-239
67.	Pecuniary Losses—Unliquidated Demands....	240-244
68.	Contracts .....	245-249
69-70.	Torts .....	249-255
71.	Condemnation Proceedings.....	256-257
72.	Defendant not Responsible for Delay.....	257
73.	Interest on Overdue Paper—Contract and Statute Rate .....	258-262
74.	Compound Interest.....	263-267

## CHAPTER VI

### VALUE

75.	Definition .....	268
76.	How Estimated.....	269-271
77-78.	Market Value.....	271-277
79.	Value Peculiar to Owner.....	277-279
80-81.	Pretium Affectionis.....	279-280
82.	Time and Place of Assessment.....	281-283
83-84.	Highest Intermediate Value.....	284-295
85-86.	Medium of Payment—Legal Tenders.....	295-300

## CHAPTER VII

## EXEMPLARY DAMAGES

Sections		Pages
87-88.	In General.....	301-309
89-90.	When Recoverable.....	310-324
91.	Liability of Principal for Act of Agent.....	324-328

## CHAPTER VIII

## PLEADING AND PRACTICE

92.	Allegation of Damage—The Ad Damnum.....	329-331
93-95.	Form of Statement.....	332-337
96-97.	Province of Court and Jury.....	337-349

## CHAPTER IX

## BREACH OF CONTRACT FOR SALE OF GOODS

98-100.	Action by Seller—Where Property has Not Passed—Damages for Nonacceptance.....	350-353
101.	Where Property has Passed—Damages for Nonpayment .....	354-355
102-103.	Action by Buyer—Damages for Nondelivery.....	355-361
104.	Damages as for Conversion.....	362-363
105.	Damages for Breach of Warranty.....	363-368

## CHAPTER X

## DAMAGES IN ACTIONS AGAINST CARRIERS

106-107.	Carriers of Goods—Damages for Refusal to Transport .....	369-370
108.	Damages for Loss or Nondelivery.....	371-372
109.	Damages for Injury in Transit.....	373-374
110-111.	Damages for Delay.....	374-376
112.	Consequential Damages.....	376-377
113.	Carriers of Passengers—Damages for Injuries to Passenger .....	378-380
114.	Exemplary Damages and Mental Suffering...	380
115.	Personal Injury.....	380-381
116.	Failure to Carry Passenger—Delay.....	381
117.	Failure to Carry to Destination—Wrongful Ejection .....	381-385

## CHAPTER XI

## DAMAGES IN ACTIONS AGAINST TELEGRAPH COMPANIES

Sections	Pages
118. Public Nature.....	386-388
119. Action by Sender.....	388-389
120. Action by Receiver.....	389-390
121-122. Compensatory Damages.....	390-392
123. Proximate and Certain Damages.....	392-399
124. Remote and Speculative Damages.....	399-403
125. Damages not within Contemplation of Parties —Notice of Purpose and Importance of Mes- sage .....	403-410
126. Messages Not Understood—Cipher Messages..	411-416
127. Avoidable Consequences.....	416-418
128. Exemplary Damages.....	418-420

## CHAPTER XII

## DAMAGES FOR DEATH BY WRONGFUL ACT

129. The Rule at Common Law.....	421-425
130-131. Damages in Statutory Action—Pecuniary Loss..	425-428
132. No Damages for Solatium.....	428-433
133. Exemplary Damages.....	433-435
134. No Damages for Injury to Deceased.....	436-438
135. Medical and Funeral Expenses.....	438-439
136. Prospective Pecuniary Losses.....	440-441
137. Future Care and Support.....	441-449
138-139. Future Services.....	449-462
140. Prospective Benefits.....	462-471
141. Prospective Inheritance.....	471-473
142. Evidence of Pecuniary Condition of Beneficiaries	474-476
143. Expectation of Life—Life Tables.....	476-478
144. Interest as Damages.....	478
145. Reduction of Damages.....	479-481
146. Discretion of Jury.....	481-487
147. Nominal Damages.....	488-489
148. Allegation of Damages.....	490-492

## CHAPTER XIII

## WRONGS AFFECTING REAL PROPERTY

149-151. Damages for Detention of Real Property.....	493-497
152. Damages for Detention of Dower.....	498-499

**TABLE OF CONTENTS**

**xiii**

<b>Sections</b>		<b>Pages</b>
<b>153-154.</b>	<b>Injuries to Real Property—Trespasses.....</b>	<b>499-504</b>
<b>155-156.</b>	<b>Nuisance .....</b>	<b>504-507</b>
<b>157-158.</b>	<b>Waste .....</b>	<b>508</b>
<b>159.</b>	<b>Contracts to Sell Real Property—Breach by Ven-</b>	
	<b>dor .....</b>	<b>509-511</b>
<b>160.</b>	<b>Breach by Vendee.....</b>	<b>512</b>
<b>161.</b>	<b>Breach of Covenants—Seisin and Right to Convey</b>	<b>513-514</b>
<b>162.</b>	<b>Warranty and Quiet Enjoyment.....</b>	<b>515-516</b>
<b>163.</b>	<b>Against Incumbrances.....</b>	<b>517-519</b>
<b>164.</b>	<b>Covenants in Leases.....</b>	<b>519-520</b>

**CHAPTER XIV**

**BREACH OF MARRIAGE PROMISE**

<b>165.</b>	<b>In General.....</b>	<b>521-522</b>
<b>166.</b>	<b>Compensatory Damages.....</b>	<b>522-529</b>
<b>167.</b>	<b>Exemplary Damages.....</b>	<b>529-531</b>

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# HANDBOOK

ON THE

# LAW OF DAMAGES

SECOND EDITION

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## CHAPTER I

### DEFINITIONS AND GENERAL PRINCIPLES

1. Definition and Nature
2. The Theory of Damages.
3. Wrong and Damage.
4. Lawful and Unlawful Conduct.
5. Authorized Conduct.
- 6-7. Forbidden Conduct.
- 8-11. Conduct Neither Authorized Nor Forbidden.
12. Analysis of Legal Wrongs.
- 13-14. Classification of Damages.

### DEFINITION AND NATURE

1. **Damages are the pecuniary reparation which the law compels a wrongdoer to make to the person injured by his wrong.**

Wherever the common law recognizes a right, it also gives a remedy for its violation.<sup>1</sup> "Ubi jus, ibi remedium." "Right" and "remedy" are correlative terms. Remedies are either preventive of threatened wrongs, or redressive of wrongs committed. Redressive remedies may afford specific relief, as where one is compelled to do the very thing he agreed to do;

<sup>1</sup> 3 Bl. Comm. p. 123, c. 8; *Ashby v. White*, 1 Salk. 19, 21; *Yates v. Joyce*, 11 Johns. (N. Y.) 136, 140. See "*Action*," *Dec. Dig. (Key No.)* § 16; *Cent. Dig.* §§ 85-93.

HALK DAM. (2D ED.)—1.

or they may afford merely a pecuniary reparation, as where a money award is given in lieu of the thing agreed to be done. Common-law remedies, with few exceptions,<sup>2</sup> are of the latter kind. For most wrongs, an award of a pecuniary recompense is the sole remedy afforded. Equity may prevent threatened wrongs by injunction, or afford specific relief; but at common law almost the sole power of the court is to make and enforce a money judgment.<sup>3</sup> The rules by which the amount of money or damages to be awarded in particular cases is determined constitute the law of damages, and form the subject of the present volume. These rules form a branch of the remedial law, and in the following pages their application always presupposes a violation of a right given or recognized by the law substantive.

### *Damages a Species of Property*

The right to recover damages for an injury is a species of property, and vests in the injured party immediately on the commission of the wrong.<sup>4</sup> It is not the subsequent verdict and judgment, but the commission of the wrong, that gives the right. The verdict and judgment simply define its extent. Being property, it is protected by the ordinary constitutional guaranties.<sup>5</sup> Except in so far as the common-law rule has been modified by statute, the right to damages for a purely

<sup>2</sup> Replevin, detinue, ejectment, proceedings to recover dower, abatement of nuisance, quo warranto, mandamus, prohibition, habeas corpus, estrepement, and the obsolete *brevia anticipantia*. See 1 Co. Litt. 100a; Story, Eq. Jur. §§ 730, 825.

<sup>3</sup> In *Robinson v. Bland*, 2 Burrows, 1077-1086, an action for nonpayment of money, Lord Mansfield said: "Although this be nominally an action for damage, yet it is really and effectually brought for a specific performance of the contract; for pecuniary damages upon a contract for the payment of money are, from the nature of the thing, a specific performance." See "*Damages*," *Dec. Dig. (Key No.)* §§ 1, 3; *Cent. Dig.* § 1.

<sup>4</sup> 2 Bl. Comm. 438; 1 Suth. Dam. (3d Ed.) § 7; 1 Sedg. Dam. (8th Ed.) § 5. See, also, *Griffin v. Wilcox*, 21 Ind. 370. See "*Damages*," *Dec. Dig. (Key No.)* § 7; *Cent. Dig.* § 6.

<sup>5</sup> *Cooley*, Const. Lim. (5th Ed.) 445; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; *Thornton v. Turner*, 11 Minn. 336 (Gil. 237); *Williar v. Baltimore Butchers' Loan &*

personal tort or for breach of a marriage promise does not pass to the personal representative of the injured party and is not assignable.<sup>6</sup>

The right to damages, when based on a breach of contract rights or injury to property, passes to the personal representatives of the injured party and is assignable.<sup>7</sup>

Annuity Ass'n of Baltimore City, 45 Md. 546; Griffin v. Wilcox, 21 Ind. 370; Chicago, St. L. & N. O. R. Co. v. Pounds, 11 Lea (Tenn.) 127; Thirteenth & F. St. P. Ry. v. Boudrou, 92 Pa. 475, 482, 37 Am. Rep. 707. It cannot be extinguished except by act of the parties, or by operation of statutes of limitation. Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; Allaire v. Whitney, 1 Hill (N. Y.) 484; Whitney v. Allaire, 1 N. Y. 305; Christianson v. Linford, 3 Rob. (N. Y.) 215; Bayliss v. Fisher, 7 Bing. 153; Willoughby v. Backhouse, 4 Dowl. & R. 539, 2 Barn. & C. 821; Clarke v. Meigs, 10 Bosw. (N. Y.) 337. See "*Constitutional Law*," Dec. Dig. (Key No.) §§ 277, 321; Cent. Dig. §§ 762, 766, 950-955; "*Property*," Dec. Dig. (Key No.) § 7; Cent. Dig. § 9.

<sup>6</sup> Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Grant v. Ludlow's Adm'r, 8 Ohio St. 1; Rice v. Stowe, 1 Allen (Mass.) 566; Linton v. Hurley, 104 Mass. 353; Hovey v. Page, 55 Me. 142; Jordan v. Gillen, 44 N. H. 424; Nash v. Hamilton, 3 Abb. Prac. (N. Y.) 35.

The common-law rule has, however, been modified by statute in many states. See "*Assignments*," Dec. Dig. (Key No.) § 24; Cent. Dig. §§ 42-46.

<sup>7</sup> Final v. Backus, 18 Mich. 218; Sears v. Conover, \*42 N. Y. 113; North v. Turner, 9 Serg. & R. (Pa.) 244; Johnson v. Bennett, 5 Abb. Prac. N. S. (N. Y.) 331; Butler v. New York & E. R. Co., 22 Barb. (N. Y.) 110; Haight v. Hayt, 19 N. Y. 464; Richtmeyer v. Remsen, 38 N. Y. 206; Purple v. Hudson R. R. Co., 4 Duer (N. Y.) 74; Zogbaum v. Parker, 66 Barb. (N. Y.) 341; Waldron v. Willard, 17 N. Y. 466; Grocers' Nat. Bank v. Clark, 48 Barb. (N. Y.) 26; McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515; McDougall v. Walling, 48 Barb. (N. Y.) 364; Fried v. New York Cent. R. Co., 25 How. Prac. (N. Y.) 285; Munsell v. Lewis, 4 Hill (N. Y.) 635; Robinson v. Weeks, 6 How. Prac. (N. Y.) 161; Jordan v. Gillen, 44 N. H. 424; Foy v. Troy & B. R. Co., 24 Barb. (N. Y.) 382; Smith v. New York & N. H. R. Co., 28 Barb. (N. Y.) 605; Blakeney v. Blakeney, 6 Port. (Ala.) 109, 30 Am. Dec. 574; Nettles v. Barnett, 8 Port. (Ala.) 181; Hoyt v. Thompson, 5 N. Y. 320, 347; The Sarah Ann, 2 Sumn. 206, Fed. Cas. No. 12,342; Meech v. Stoner, 19 N. Y. 26. See "*Assignments*," Dec. Dig. (Key No.) §§ 22, 23; Cent. Dig. §§ 35-41; "*Executors and Administrators*," Dec. Dig. (Key No.) § 49; Cent. Dig. §§ 301-305.



## THE THEORY OF DAMAGES

2. The theory upon which damages are awarded in civil actions is that they are an indemnity to the person injured, not a punishment to the wrongdoer.

**EXCEPTION**—Where a tort is accompanied by circumstances of fraud, gross negligence, malice, or oppression, exemplary damages are sometimes awarded as a punishment to the offender.

### *Compensation the Rule*

Compensation is the fundamental and all pervasive principle governing the award of damages.<sup>8</sup> Compensation, not restitu-

<sup>8</sup> *Filliter v. Phippard*, 12 Jur. 202, 204, 11 Adol. & E. (N. S.) 347, 356; *HEWSON-HERZOG SUPPLY CO. v. MINNESOTA BRICK CO.*, 55 Minn. 530, 57 N. W. 129, Cooley, Cas. Damages, p. 1. "The declared object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed or the tort not committed." Sedg. Dam. § 30; *Prestwood v. Carlton*, 162 Ala. 327, 50 South. 254; *Allison v. Chandler*, 11 Mich. 542; *Smith v. Sherwood*, 2 Tex. 460; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Robinson v. Harman*, 1 Exch. 850. "In general, the rule for the measure of damages in cases of tort may be said to be that which aims at actual compensation for the injury. \* \* \* There are qualifications, however; as that inadvertent or unintentional injuries or acts, unaccompanied with malice, draw after them only their direct and immediate consequences, and not those remote and speculative; while grossly negligent or malicious acts may be the subject of large damages." Agnew, J., in *Seely v. Alden*, 61 Pa. 302, 304, 100 Am. Dec. 642. See, also, *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526. "The injured party must be indemnified. He must be placed in the same situation in which he would have been had the wrong not been committed." Duer, J., in *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614, 620. See "*Damages*," *Dec. Dig. (Key No.)* §§ 1, 15; *Cent. Dig.* § 1.

tion, value, not cost, is the measure of relief.<sup>9</sup> Whether the action be *ex contractu* or *ex delicto*, the end in view is the same,—that plaintiff be made whole. “In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort. Except in those special cases where punitive damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured? And the answer to that question cannot be affected by the form of action in which he seeks his remedy.”<sup>10</sup> Indemnity is achieved, in the eyes of the law, by awarding plaintiff a money judgment. Practically, an injured party seldom receives complete indemnity. All injuries are not pecuniary, and many are difficult to estimate in money. No amount of money is adequate to compensate one for the loss of a limb or an eye. Their value cannot be estimated in money. But, in the nature of things, a money award is the only redress the law can offer.

#### *Proximate and Remote Consequences*

Though compensation is the theory and aim of the law in awarding damages, every consequence of a wrong is not an element in the calculation of what is legal compensation. A person wronged can recover compensation only for the direct or proximate consequences of the wrong. To hold one liable for all the consequences of a wrongful act “would set society

<sup>9</sup> Pol. Torts, c. 5, citing *Whitham v. Kershaw*, 16 Q. B. Div. 613. See, also, *Snell v. Delaware Ins. Co.*, 4 Dall. 430, 1 L. Ed. 896; *Quinn v. Van Pelt*, 56 N. Y. 417. Cf. *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. C. 648, 20 S. E. 718. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 1, 15, 103; *Cent. Dig.* §§ 1, 260–271.

<sup>10</sup> *Baker v. Drake*, 53 N. Y. 211, 220, 13 Am. Rep. 507. In an action for breach of contract of carriage, “what the passenger is entitled to recover is the difference between what he ought to have had and what he did have.” *Hobbs v. Railroad Co.*, L. R. 10 Q. B. 111, 120. See, also, *Wall v. City of London Real Property Co.*, L. R. 9 Q. B. 249. Damages for breach of contract is not limited by the consideration paid. *Quinn v. Van Pelt*, 56 N. Y. 417; *Bennett v. Buchan*, 61 N. Y. 222. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 1, 30; *Cent. Dig.* §§ 1, 222.

on edge, and fill the courts with useless and injurious litigation." <sup>11</sup>

A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce, and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform, and to the compensation received.<sup>12</sup> For example, consider the consequences of a failure to pay money when due. "It may bring pecuniary embarrassment to the payee, and subject him to extortion from usurers; loss of valuable and profitable contracts and undertakings,—prospective gains and profits; to the importunity of creditors; suits at law and in equity; and consequent costs and expenses; and, finally, bankruptcy and pecuniary ruin. It may cause not only loss of business, but of reputation, of comfort, peace of mind, and happiness. And, moreover, it may cause suffering, sickness, insanity, and destroy the social standing and relations, not only of himself, but of his family. But these possible, nay, perhaps, common, results, are too remote and intangible to be considered as legal losses resulting from the nonpayment of money when due. The task of investigating such results, and fixing a pecuniary value on them, would be hopeless. And, if it were possible, the liability for such remote consequential losses would appall the most heroic and paralyze the energies of the most enterprising business man." <sup>13</sup> The law therefore limits liability for consequences to the direct or proximate results of the act complained of.<sup>14</sup>

<sup>11</sup> *Fleming v. Beck*, 48 Pa. 309, 313. See "*Damages*," *Dec. Dig. (Key No.)* §§ 16-22; *Cent. Dig.* §§ 34-61.

<sup>12</sup> *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Cutting v. Grand Trunk Ry. Co.*, 13 Allen (Mass.) 381; *Fox v. Harding*, 7 Cush. (Mass.) 516; *Le Peintur v. Southeastern Ry. Co.*, 2 Law T. (N. S.) 170. See "*Damages*," *Dec. Dig. (Key No.)* §§ 16-29; *Cent. Dig.* §§ 34-70.

<sup>13</sup> *Field, Dam.* § 211.

<sup>14</sup> *Add. Torts*, 6. See, also, *post*, p. 42.

"Causa proxima et non remota spectatur." Any other rule would result in wrong and injustice. There is a point beyond which the chain of causation cannot be traced with any degree of certainty. "To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile."<sup>15</sup>

### *Exemplary Damages*

The allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil actions are awarded;<sup>16</sup> but the case of aggravated torts constitutes a well-recognized exception to the rule. In such cases it is thought that the damages are not limited to an amount sufficient to compensate plaintiff for the wrong suffered, but that a further sum, called "exemplary," "vindictive," or "punitive" damages, may be awarded as a punishment to the offender.<sup>17</sup> Exemplary damages cannot be recovered for breach of contract,<sup>18</sup> with perhaps the single exception of a breach of promise of marriage.<sup>19</sup>

<sup>15</sup> Cooley, Torts, p. 73.

<sup>16</sup> Field, Dam. § 32, note; Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489, 23 L. Ed. 474. See "Damages," Dec. Dig. (Key No.) §§ 1, 36; Cent. Dig. §§ 1, 72-88.

<sup>17</sup> Thus, in Emblen v. Myers, 6 Hurl. & N. 54, it was held that the jury might take into consideration the motives of the defendant; and, if negligence was accompanied with a contempt of the plaintiff's rights and convenience, they might give exemplary damages. See, also, Day v. Woodworth, 13 How. 363, 14 L. Ed. 18; Winter v. Peterson, 24 N. J. Law, 524, 61 Am. Dec. 678; Hagan v. Providence & W. R. Co., 3 R. I. 88, 62 Am. Dec. 377; Dean v. Blackwell, 18 Ill. 336; Schindel v. Schindel, 12 Md. 108; GODDARD v. GRAND TRUNK RY., 57 Me. 202, 2 Am. Rep. 39; Cooley, Cas. Damages, 190; Lucas v. Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517. See "Damages," Dec. Dig. (Key No.) § 87; Cent. Dig. §§ 188-192.

<sup>18</sup> Ford v. Fargason, 120 Ga. 708, 48 S. E. 180. In Singleton's Adm'r v. Kennedy, 9 B. Mon. (Ky.) 222, it was expressly held that vindictive damages could not be given for a fraudulent breach of contract. See "Damages," Dec. Dig. (Key No.) §§ 89, 90; Cent. Dig. §§ 202, 203. But see post, p. 318.

<sup>19</sup> Southard v. Rexford, 6 Cow. (N. Y.) 254; Coryell v. Colbaugh,

In many jurisdictions the soundness of the doctrine of exemplary damages is stoutly denied, but the weight of authority is the other way. The doctrine is to be supported, if at all, mainly on the grounds of authority and convenience. The subject will be fully considered in a subsequent chapter.<sup>20</sup>

*Damages a Mixed Question of Law and Fact*

The extent of the loss caused by a wrong, and therefore the quantum of damages necessary to indemnify the party injured, is a question of fact, but it is not left to the arbitrary discretion of a jury. The rule by which the amount or extent of redress should be ascertained in any given case is a question of law,<sup>21</sup> and the jury are bound by the rule laid down by the court.<sup>22</sup> In cases where exemplary damages are considered proper, and those cases of personal torts where the damages cannot be measured by any definite pecuniary standard, because not made up of pecuniary elements, the sound discretion of the jury is the only standard possible;<sup>23</sup> and even in this class of cases, though the jury have a large discretion, it is not wholly arbitrary, for the court may set aside a verdict which is so unreasonable as to clearly show that it was the result of passion or prejudice.<sup>24</sup>

1 N. J. Law, 77, 1 Am. Dec. 192; *Stout v. Prall*, 1 N. J. Law, 79; *Denslow v. Van Horn*, 16 Iowa, 476; *Smith v. Woodfine*, 1 C. B. (N. S.) 660; *Berry v. Da Costa*, L. R. 1 C. P. 331; *Green v. Spencer*, 3 Mo. 318, 26 Am. Dec. 672; *Hill v. Maupin*, 3 Mo. 323; *CHELLIS v. CHAPMAN*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 708; *Cooley*, Cas. Damages, 279. See, also, *Baldy v. Stratton*, 11 Pa. 316, 322, in which it was held by *Rogers, J.*, that "it would be a mere mockery of justice to confine the jury to give compensation merely for the value of a worthless husband." In *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561, it was held that, as to the measure of damages, an action for breach of promise of marriage has always been classed with actions of torts, and that the defendant's motives might be inquired into as furnishing grounds for punitive damages. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 30; Cent. Dig. § 46.

<sup>20</sup> See post, p. 301. See "*Damages*," Dec. Dig. (Key No.) § 87; Cent. Dig. §§ 188-192.

<sup>21</sup> See post, p. 337.

<sup>22</sup> See post, p. 337.

<sup>23</sup> See post, p. 316.

<sup>24</sup> See post, p. 341.

## WRONG AND DAMAGE

## 3. Whenever a legal right is violated, and only then, damages may be recovered.

*Damnum Absque Injuria—Injuria Sine Damno*

The law does not undertake vain or impossible things. It has always recognized that in actual life many losses must go without compensation, and much harm be suffered without redress. Not every damage in fact is damage in law. "There is merely an imperfect coincidence between the spheres of things hurtful in fact and things hurtful in law; the sphere of the latter being smaller than, and included in, that of the former. This distinction is expressed in the technical language of English lawyers by the pair of contrasted terms 'damnum' and 'injuria'—the former comprising that which is hurtful in fact; the latter, that which is wrongful in law. The space throughout which the sphere of the former fails to coincide with that of the latter is the domain of what is technically known as 'damnum absque injuria.'"<sup>25</sup>

To sustain an action for damages, the violation of a legal right must be shown.<sup>26</sup> For every violation of a legal right

<sup>25</sup> Salmond, Jur. 160.

<sup>26</sup> WEBB v. PORTLAND MFG. CO., 3 Sumn. 189, Fed. Cas. No. 17,322; Cooley, Cas. Damages, 13; Freund v. Murray, 39 Mont. 540, 104 Pac. 683, 25 L. R. A. (N. S.) 959. "A legal right must be invaded in order that an action of tort may be maintained. The mere fact that a complainant may have suffered a damage of the kind which the law recognizes is not enough. There must also be a violation of a duty recognized by law. In the language of the civil law, mere damnum is not enough; there must also be injuria." Jag. Torts, 87. "You must have, in our law, injury as well as damage." Jessell, M. R., in Day v. Brownrigg, 10 Ch. Div. 394 (304). See, also, Backhouse v. Bonomi, 9 H. L. Cas. 503; Salvin v. Coal Co., 9 Ch. App. 705. It is an essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right. Merely that it will, however, do a man harm in his interest, is not enough. Rogers v. Rajendro, 13 Moore, P. C. 209. "At the foundation of every tort, there must be some violation of a

damages may be recovered.<sup>27</sup> This is necessarily so, for, as has been seen, an award of damages is substantially the only remedy of the common law; and, if damages could not be recovered for the violation of every legal right, there would be rights without remedies, and "it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal."<sup>28</sup> "Rights and duties, so called, existing beyond the limits of legal remedy, may be matter of enlightened curiosity, and moral and metaphysical speculation, but they are not violations of common law."<sup>29</sup> It is necessary, therefore, to determine the exact nature of legal rights.

### *Same—Legal Rights and Wrongs*

Governments exist for the benefit of the governed, and this benefit is afforded in the establishment and protection of rights.<sup>30</sup> Every law exists for the purpose of establishing and protecting legal rights.<sup>31</sup> A legal right is a right with which the law invests one person, and in respect to which, for his benefit, a duty is imposed on another or others to do or re-

legal duty, and therefore some unlawful act or omission." *Rich v. New York Cent. & H. R. R. Co.*, 87 N. Y. 382. "The violation of a moral right or duty, unless it also amounts to a legal right or duty, does not constitute a tort." *Chase, Lead. Cas.* 8; 1 *Aust. Jur. lect.* 5, "Conflict of Law and Morality;" *Rex v. Smith*, 2 *Car. & P.* 449. "It is not every moral and social duty the neglect of which is the ground of an action; for there are what are called, in the civil law, 'duties of imperfect obligation,' for the enforcing of which no action lies." *Lord Kenyon, C. J.*, in *Pasley v. Freeman*, 3 *Term R.* 51, 63. See "Action," *Dec. Dig. (Key No.)* §§ 1, 16; *Cent. Dig.* §§ 1-9, 85-93; "Damages," *Dec. Dig. (Key No.)* § 3.

<sup>27</sup> *WEBB v. PORTLAND MFG. CO.*, 3 *Sumn.* 189, *Fed. Cas. No.* 17,322, *Cooley, Cas. Damages*, 18. See "Action," *Dec. Dig. (Key No.)* §§ 1, 16; *Cent. Dig.* §§ 1-9, 85-93.

<sup>28</sup> *Lord Holt* in *Ashby v. White*, 2 *Ld. Raym.* 955. See "Action," *Dec. Dig. (Key No.)* §§ 1, 16; *Cent. Dig.* §§ 1-9, 85-93.

<sup>29</sup> American note to *Coggs v. Bernard*, 1 *Smith, Lead. Cas. Eq.* 411. See "Action," *Dec. Dig. (Key No.)* §§ 1, 16; *Cent. Dig.* §§ 1-9, 85-93.

<sup>30</sup> *Cooley, Torts*, 23.

<sup>31</sup> *Holl. Jur. c.* 8; *Wise, Jur.* 20.

frain from doing certain acts.<sup>32</sup> Rights and duties are correlative and coexistent terms. Sometimes the right is given, and sometimes the duty is created. Whenever a right is given, the corresponding duty at once arises; whenever a duty is created, a corresponding right springs into existence. "Violation of right" and "breach of duty" are equivalent terms.<sup>33</sup>

The one fundamental right of which all men are desirous, and for the enforcement of which governments are established, is the right not to be harmed in any respect which affects their being and well-being, their happiness, and immunity from pains. In our system of law, speaking broadly, this right not to be harmed takes the form of the common-law command not to injure another in respect to his person, his property, or his reputation.<sup>34</sup> This is the duty imposed on all members of the community, and the correlative rights arise in each member not to be injured in respect to his security of person, his security of reputation, and his security in the acquisition and enjoyment of property. Rights which cannot be referred to one of these three classes have no legal existence. For example, the law has not created a right to privacy; and therefore an action for damages for the invasion of privacy by opening windows was dismissed. Defendant, by overlooking plaintiff's property, violated no legal right of the plaintiff, because a right to privacy is unknown.<sup>35</sup> So, also, the law has not created a right to mental tranquillity, and therefore no action lies for causing mere annoyance and worry,<sup>36</sup> or a mere apprehension or fear of physical harm.<sup>37</sup> So, too, no action lies for causing fright or nervous terror, unless accompanied

<sup>32</sup> Aust. Jur. lect. 16. See, also, lect. 6.

<sup>33</sup> Pig. Torts, 10.

<sup>34</sup> Pig. Torts, 10; Cooley, Torts, 23.

<sup>35</sup> *Tapling v. Jones*, 11 H. L. Cas. 290. See "Torts," *Dec. Dig. (Key No.)* § 8; *Cent. Dig.* § 8.

<sup>36</sup> *Georgia R. & Electric Co. v. Baker*, 1 Ga. App. 832, 58 S. E. 88. See "Damages," *Dec. Dig. (Key No.)* §§ 48-56; *Cent. Dig.* §§ 100-105, 255-259.

<sup>37</sup> *Ward v. West Jersey & S. R. Co.*, 65 N. J. Law, 383, 47 Atl. 561. See "Damages," *Dec. Dig. (Key No.)* §§ 48-54; *Cent. Dig.* §§ 100-105.



by physical injury,<sup>38</sup> or unless physical harm is a proximate result.<sup>39</sup> A mere insult, however gross, is not actionable.<sup>40</sup>

It is obvious that, even with respect to person, property, and reputation, the right not to be harmed cannot exist to the full extent of the above broad statement of the right; for, as every member of the community has the same right not to be harmed, the rights of different individuals would clash. Thus, the right of one to do what he likes on his own property, which is a part of his right not to be harmed in respect to his property, may conflict with the right of another not to be harmed in respect to his property. Each one's right not to be harmed, therefore, must be limited so as to allow of the equal exercise by others of their rights. It follows that harm may sometimes be inflicted without violating a legal right, for all harm is not prohibited. In other words, while damage or harm is an essential element, mere damage alone does not constitute a legal wrong.<sup>41</sup>

<sup>38</sup> *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Terre Haute & I. R. Co. v. Brunner*, 128 Ind. 542, 26 N. E. 178; *Canning v. Inhabitants of Williamstown*, 1 Cush. (Mass.) 451; *Ft. Worth & D. C. Ry. Co. v. Burton* (Tex. App.) 15 S. W. 197; *Gulf, C. & S. F. Ry. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866; *Ewing v. Pittsburgh, C. & St. L. Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709. Cf. *Yoakum v. Kroeger* (Tex. Civ. App.) 27 S. W. 953; *Hutchinson v. Stern*, 115 App. Div. 791, 101 N. Y. Supp. 145; *Hess v. American Pipe Mfg. Co.*, 221 Pa. 67, 70 Atl. 294. See "*Damages*," *Dec. Dig. (Key No.)* §§ 47-54; *Cent. Dig. §§ 100-105*. There are, however, some decisions which apparently support a contrary doctrine. See post, p. 140.

<sup>39</sup> *Williamson v. Central of Georgia Ry. Co.*, 137 Ga. 125, 56 S. E. 119; *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545; *Green v. J. A. Shoemaker & Co.*, 111 Md. 69, 73 Atl. 688, 23 L. R. A. (N. S.) 667. For a discussion of the principles underlying the decisions, see post, p. 140. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-54; *Cent. Dig. §§ 100-105*.

<sup>40</sup> *Grayson v. St. Louis Transit Co.*, 100 Mo. App. 60, 71 S. W. 730. By Code Va. (1904) § 2897, insulting words are made actionable. See "*Damages*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig. § 100*.

<sup>41</sup> See ante, note 26.

While the primary object of law is to prevent harm, and all legal rights may be resolved into the right not to be harmed, the fact that conduct results in damage or harm is not conclusive that such conduct is wrongful in law; for, as has been seen, the law does not forbid all damage. There has been much confusion of thought in regard to the terms "damnum" and "injuria," which may be avoided by careful definition and consistent use of the terms. Thus, it is said that no action lies for *damnum absque injuria*; and this, as has been seen, is true, the phrase being translated "actual damage without legal wrong."<sup>42</sup> But the converse of this proposition is also stated,—that no action lies for *injuria sine damno*. Translating, as before, we have the proposition that "for a legal wrong without actual damage no action lies," which is untrue.<sup>43</sup> As has been seen, to deny the remedy is to deny the right which has been violated.<sup>44</sup> Again, substituting for "legal wrong" its equivalent, we have the proposition that "for the violation of a right not to be harmed, without actual damage, no action lies," which is sheer nonsense.

It is objected that damage is not always an essential element of a legal wrong, because many wrongs are admitted to exist for which an action may be maintained, though no damage has resulted. Thus, one is liable for trespass if he merely walks across another's field, though he does absolutely no damage;<sup>45</sup>

<sup>42</sup> Ante, p. 9; *RANDALL v. HAZLETON*, 12 Allen (Mass.) 412, Cooley, Cas. Damages, 3; *Spring v. Russell*, 7 Greenl. (Me.) 273. For instances of application of the rule, see *Surocco v. Geary*, 3 Cal. 69, 58 Am. Dec. 385 (destruction of property to prevent spread of fire); *Howland v. Vincent*, 10 Metc. (Mass.) 371, 43 Am. Dec. 442 (pure accident); *PENN. COAL CO. v. SANDERSON*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445; Cooley, Cas. Damages, 4 (lawful use of one's property); *Robertson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828 (privacy); *Coleman v. Lytle*, 49 Tex. Civ. App. 42, 107 S. W. 562 (loss by defense of suit). See "Action," *Dec. Dig. (Key No.)* §§ 1, 16; *Cent. Dig.* §§ 1-9, 85-93.

<sup>43</sup> *WEBB v. PORTLAND MFG. CO.*, 3 Sumn. 189, Fed. Cas. No. 17,322, Cooley, Cas. Damages, 13. See "Action," *Dec. Dig. (Key No.)* §§ 1, 16; *Cent. Dig.* §§ 1-9, 85-93.

<sup>44</sup> Ante, p. 9.

<sup>45</sup> "So a man shall have an action against another for riding

and one who breaks a contract is liable in damages, though the breach actually results in a benefit to the other party.<sup>46</sup> It is equally clear that in many cases conduct is not actionable, i. e. wrongful in law, unless followed by damage. Thus, negligence is not actionable, unless it results in damage.<sup>47</sup> It is therefore sometimes said that there are two kinds of wrongs, according as damage is or is not an essential element, and two kinds of rights corresponding,—absolute rights and the right not to be harmed.<sup>48</sup> It has been well said that no more

over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there." Holt, C. J., in *Ashby v. White*, 2 Ld. Raym. 938, 955. "There is no doubt that a right of action accrues whenever a person interferes with his neighbor's rights, as, for example, by stepping on his land; \* \* \* and this though no actual damage may result." Erle, C. J., in *Smith v. Thackerah*, L. R. 1 C. P. 564, 566. See, also, *Dixon v. Clow*, 24 Wend. (N. Y.) 188; *McAneany v. Jewett*, 10 Allen (Mass.) 151; *Carter v. Wallace*, 2 Tex. 206. See "*Trespass*," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 134, 136.

"*Hibbard v. Western Union Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775. For the technical breach of a bond, though without damage, nominal damages may be recovered. *State v. Reinhardt*, 31 Mo. 95. Though a trespass result in benefit, instead of damage, plaintiff is entitled to recover nominal damages. *Jewett v. Whitney*, 43 Me. 242; *Jones v. Hannovan*, 55 Mo. 462; *MURPHY v. FOND DU LAC*, 33 Wis. 365, 99 Am. Dec. 181; *Cooley, Cas. Damages*, 132. See "*Damages*," *Dec. Dig. (Key No.)* §§ 9, 117; *Cent. Dig.* §§ 7-15, 285, 286.

"*Mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused.*" *Brunsden v. Humphrey*, 14 Q. B. Div. 141, 150. See "*Action*," *Dec. Dig. (Key No.)* §§ 1, 2; *Cent. Dig.* §§ 1-16.

"Mr. Jaggard says in his work on Torts, at page 80: "The simple truth is that sometimes plaintiff can recover when he has not shown damage, and sometimes he cannot. On the one hand, mere damage may not constitute a cause of action, in the absence of violation of duty. On the other hand, mere violation of duty may not constitute a cause of action, in the absence of damage. There may be no such thing as a legal wrong without damage, but sometimes there cannot be a legal wrong unless there has been damage. In some cases the law presumes damage, and in some cases damages must be proved. In other words, there are two kinds of rights,—one, a simple right, the infringe-

unsatisfactory distinction could be devised.<sup>49</sup> The true solution of the difficulty is to be found in the principle of presumption of damage. "In some cases, from the very nature of the case, the law conclusively presumes damage; that is, the plaintiff is not put to the trouble of proving it. In other cases the law does not presume damage; that is, the plaintiff is required to prove its existence. This being so, the right, as we have already pointed out, is, in all cases, not to be injured; in my person, my reputation, or my property, as the case may be."<sup>50</sup> Accurately speaking, there is no such thing as *injuria sine damno*,<sup>51</sup> because *injuria* imports *damnum*.<sup>52</sup> Whenever a legal right is violated, damage is necessarily done.

### LAWFUL AND UNLAWFUL CONDUCT

4. For the purpose of determining what conduct is actionable—i. e. wrongful in law—conduct may be divided into three classes:

- (a) Authorized conduct.
- (b) Forbidden conduct.
- (c) Conduct neither authorized nor forbidden.

### SAME—AUTHORIZED CONDUCT

5. Damage necessarily incident to authorized conduct does not constitute a cause of action. It is *damnum absque injuria*.

For the benefit of society at large, and to prevent a clash between rights of individuals, certain conduct is expressly

ment of which is, in the absence of exceptional circumstances, necessarily actionable; the other is a right not to be harmed, the violation of which is actionable only when harm is suffered."

<sup>49</sup> Fig. Torts, 126.

<sup>50</sup> Fig. Torts, 126.

<sup>51</sup> Salmond, Jur. 169; Innes, Torts.

<sup>52</sup> *WEBB v. PORTLAND MFG. CO.*, 3 Sumn. 189, Fed. Cas. No. 17,322, Cooley, Cas. Damages, 13. See "*Damages*," *Dec. Dig.*

authorized by law. Damage necessarily caused by such authorized conduct will not support an action. It is *damnum absque injuria*. Its infliction is not a legal wrong.<sup>53</sup> Conduct may be authorized either by statute or by common law. For damage resulting from the proper exercise of statutory authority no action lies.<sup>54</sup> Thus, annoyance from noise, smoke, and disturbances necessarily attending the operation of a railroad under its franchise, and its interference with property, is *damnum absque injuria*; <sup>55</sup> but, if the road be operated without authority, liability attaches.<sup>56</sup> So, also, where a local nuisance is authorized by statute, its maintenance is not ac-

(*Key No.*) § 9; *Cent. Dig.* §§ 7-15; "*Action*," *Dec. Dig.* (*Key No.*) §§ 1, 2; *Cent. Dig.* §§ 1-16.

<sup>53</sup> *Jagg. Torts*, p. 139 et seq., exhaustively collecting and discussing cases.

<sup>54</sup> *Managers v. Hill*, L. R. 6 App. Cas. 193; *Gaslight & Coke Co. v. Vestry of St. Mary Abbott's*, 15 Q. B. Div. 1, 5; *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837; *Hamilton v. Vicksburg, S. & P. R. Co.*, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. Ed. 393; *Sedalia Gaslight Co. v. Mercer*, 48 Mo. App. 644; *Beseman v. Pennsylvania R. Co.*, 50 N. J. Law, 235, 13 Atl. 164; *Id.*, 52 N. J. Law, 221, 20 Atl. 169; *Durand v. Borough of Ansonia*, 57 Conn. 70, 17 Atl. 283; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 652; *Bell v. Norfolk S. R. Co.*, 101 N. C. 21, 7 S. E. 467; *Jones v. St. Louis R. Co.*, 84 Mo. 151; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa, 148, 154, 4 Am. Rep. 205; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283; *Ellis v. Iowa City*, 29 Iowa, 239; *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49; *Dodge v. Essex County Com'rs*, 3 Metc. (Mass.) 380. Perhaps the best illustration of the absence of liability for damages incident to authorized act is to be found in the contrast of *Rylands v. Fletcher*, L. R. 3 H. L. 330, with the *Zemindar Case*, L. R. 1 Indian App. 364. See "*Nuisance*," *Dec. Dig.* (*Key No.*) § 6; *Cent. Dig.* §§ 35-38.

<sup>55</sup> *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Carroll v. Wisconsin Cent. R. Co.*, 40 Minn. 168, 41 N. W. 661; *Beideman v. Atlantic City R. Co.* (N. J. Ch.) 19 Atl. 731. See "*Nuisance*," *Dec. Dig.* (*Key No.*) §§ 3, 5, 6; *Cent. Dig.* §§ 4-38; "*Railroads*," *Dec. Dig.* (*Key No.*) § 222; *Cent. Dig.* §§ 721, 723.

<sup>56</sup> *Jones v. Railway Co.*, L. R. 3 Q. B. 733. See "*Nuisance*," *Dec. Dig.* (*Key No.*) §§ 5, 6; *Cent. Dig.* §§ 4-38; "*Railroads*," *Dec. Dig.* (*Key No.*) § 222; *Cent. Dig.* §§ 721, 723.

tionable.<sup>57</sup> The common law authorizes many acts which harm another. Harm necessarily caused by the exercise of one's ordinary rights will not support an action. For example, damage consequent upon competition in trade is not actionable, for every one is authorized to engage in business;<sup>58</sup> nor does liability attach to the ordinary use of one's property.<sup>59</sup> Private persons are sometimes authorized to exercise disciplinary powers. Thus, the master of a ship is not liable for force used in maintaining order and discipline,<sup>60</sup>

<sup>57</sup> *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Hinchman v. Patterson Horse R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Managers of the Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 193; *Truman v. Railway Co.*, 29 Ch. Div. 89-108, 11 App. Cas. 45; *Biscoe v. Railway*, L. R. 16 Eq. 636; *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; *Edmondson v. City of Moberly*, 98 Mo. 523, 11 S. W. 990; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Bancroft v. City of Cambridge*, 126 Mass. 438. Where a bridge constructed in accordance with legislative authority interferes with navigation, the injury to private persons is *damnum absque injuria*. *Hamilton v. Vicksburg, S. & P. R. Co.*, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. Ed. 393; *Rhea v. Newport N. & M. V. R. Co.* (C. C.) 50 Fed. 20; *U. S. v. North Bloomfield Gravel Min. Co.* (C. C.) 53 Fed. 627. See "Nuisance," *Dec. Dig. (Key No.)* §§ 5, 6; *Cent. Dig.* §§ 6, 35-38.

<sup>58</sup> *Gloucester Grammar School Case* (1410-11), Y. B. 11 Hen. IV, p. 47, pl. 21; *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598. See, also, *Chasemore v. Richards*, 7 H. L. Cas. 349. See "Action," *Dec. Dig. (Key No.)* §§ 1, 2; *Cent. Dig.* §§ 1-16.

<sup>59</sup> *PENNSYLVANIA COAL CO. v. SANDERSON*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445, *Cooley, Cas. Damages*, 4. A blacksmith may operate his forge, and a merchant his store, without liability, although neighbors thereby suffer annoyance. *Doellner v. Tynan*, 38 How. Prac. (N. Y.) 182; *Smith v. Ingersoll Drill Co.*, 7 Misc. Rep. 374, 27 N. Y. Supp. 907, collecting cases; *McGuire v. Bloomingdale*, 8 Misc. Rep. 478, 29 N. Y. Supp. 580. See "Nuisance," *Dec. Dig. (Key No.)* §§ 5, 6; *Cent. Dig.* §§ 6, 35-38.

<sup>60</sup> *The Agincourt*, 1 Hagg. Adm. 271-274; *Bangs v. Little*, 1 Ware, 506, Fed. Cas. No. 839; *U. S. v. Alden*, 1 Spr. 95, Fed. Cas. No. 14,427; *Cushman v. Ryan*, 1 Story, 91, Fed. Cas. No. 3,515; *Turner's Case*, 1 Ware, 83, Fed. Cas. No. 14,248; *Wilson v. The Mary, Gilp*, 31, Fed. Cas. No. 17,823; *Michaelson v. Denison*, 3 Day (Conn.) 294, Fed. Cas. No. 9,523; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Sampson v. Smith*, 15 Mass. 365; *Flemming*

and parents or persons in loco parentis may enforce discipline by moderate chastisement or detention.<sup>61</sup> "The rights of necessity are a part of the law."<sup>62</sup> There is no liability for acts or omissions as to which a person has no option.<sup>63</sup> Thus,

v. Ball, 1 Bay (S. C.) 3; *Matthews v. Terry*, 10 Conn. 455; *State v. Board of Education*, 63 Wis. 234, 23 N. W. 102, 53 Am. Rep. 482; *Allen v. Hallet*, 1 Abb. Adm. 573, Fed. Cas. No. 573; *Payne v. Allen*, 1 Spr. 304, Fed. Cas. No. 10,855; *Schelter v. York*, Crabbe, 449, Fed. Cas. No. 12,446; *Jay v. Almy*, 1 Woodb. & M. 262, Fed. Cas. No. 7,236; *Butler v. McLellan*, 1 Ware, 219, Fed. Cas. No. 2,242; *Buddington v. Smith*, 13 Conn. 334, 33 Am. Dec. 407. See "*Seamen*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 195-211.

"*Cooley*, Torts, 197; *Johnson v. State*, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; *Winterburn v. Brooks*, 2 Car. & K. 16. See "*Parent and Child*," *Dec. Dig. (Key No.)* § 2; *Cent. Dig.* §§ 4-32.

"*Respublica v. Sparhawk*, 1 Dall. 357-362, 1 L. Ed. 174; *Mouse's Case*, 12 Coke, 63; *Burton v. McClellan*, 3 Ill. 434; *American Print Works v. Lawrence*, 23 N. J. Law, 604, 57 Am. Dec. 420. See "*Nuisance*," *Dec. Dig. (Key No.)* §§ 5, 6; *Cent. Dig.* §§ 6, 35-38.

"The destruction of property for the public good is authorized by necessity. *Case of Prerogative*, 12 Coke, 13; *Maleverer v. Spinke*, Dyer, 36b; *McDonald v. City of Red Wing*, 13 Minn. 38 (Gil. 25); *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980; *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689; *Inhabitants of Hyde Park v. Gay*, 120 Mass. 590; *Surocco v. Geary*, 3 Cal. 70, 58 Am. Dec. 385; *American Print Works v. Lawrence*, 23 N. J. Law, 590, 57 Am. Dec. 420; *Beach v. Trudgain*, 2 Grat. (Va.) 219; *Hale v. Lawrence*, 23 N. J. Law, 590, 57 Am. Dec. 420. And see *Arundel v. McCulloch*, 10 Mass. 70; *Campbell v. Race*, 7 Cush. (Mass.) 408, 54 Am. Dec. 728; *Mouse's Case*, 12 Coke, 63; *Respublica v. Sparhawk*, 1 Dall. 357, 1 L. Ed. 174; *Taylor v. Inhabitants of Plymouth*, 8 Metc. (Mass.) 462. As to statutory changes, see *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196. "There are many cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses, or raising bulwarks for the preservation of the kingdom against the king's enemies. \* \* \* This is a case to which the maxim applies, 'Salus populi suprema lex est.'" *Butler, J.*, in *Governor, etc., British Cast Plate Manufacturers v. Meredith*, 4 Term R. 794, 797. See, also, 12 Coke, 12, 13; *Dyer*, 60b; *Russell v. Mayor, etc., of City of New York*, 2 Denio (N. Y.) 461. And see the opinion of *Butler, J.*, in *Taylor v. Whitehead*, 2 Doug. 745, 749. Peril to human life may constitute such necessity as will excuse what would otherwise be wrongdoing. *Metropolitan Asylum Dist.*

when a highway becomes obstructed and impassable, a traveler is authorized to go on adjoining lands to avoid the obstruction, and hence he is not liable for trespass.<sup>64</sup> The law also authorizes one to repel unlawful or dangerous force by force, in the defense of person, property, or possession, whenever there is a real or an apparent necessity, honestly believed to be real, for the defense. For example, where one acting in self-defense accidentally shoots an innocent bystander, he is not liable if guilty of no negligence.<sup>65</sup> In all these cases, the act being expressly declared to be lawful, the harm necessarily resulting is *damnum absque injuria*, or "damage without legal wrong." It is the price men pay for the benefits of society.

v. Hill, L. R. 6 App. Cas. 193-205; *Eckert v. Long Island R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Clark v. Famous Shoe & Clothing Co.*, 16 Mo. App. 463. See "*Action*," *Dec. Dig. (Key No.)* §§ 1, 2; *Cent. Dig.* §§ 1-16.

<sup>64</sup> *Donahoe v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 560, 53 Am. Rep. 594; *Bullard v. Harrison*, 4 Maule & S. 387-393; *Campbell v. Race*, 7 Cush. (Mass.) 408, 54 Am. Dec. 728; *Burd. Lead. Cas.* 136. As to ways of necessity, see *Bish. Noncont. Law*, 872; *Vossen v. Dantel*, 116 Mo. 379, 22 S. W. 734; *Camp v. Whitman*, 51 N. J. Eq. 467, 26 Atl. 917; *Lankin v. Terwilliger*, 22 Or. 97, 29 Pac. 268. See "*Trespass*," *Dec. Dig. (Key No.)* §§ 10, 23; *Cent. Dig.* §§ 8-12, 48-65.

<sup>65</sup> *Morris v. Platt*, 32 Conn. 75; *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615; *Scott v. Shepherd*, 2 W. Bl. 892. As to damage caused in trying to avoid missile, see *Vallo v. United States Exp. Co.*, 147 Pa. 404, 23 Atl. 594, 14 L. R. A. 743, 30 Am. St. Rep. 741. See "*Torts*," *Dec. Dig. (Key No.)* §§ 1-8; *Cent. Dig.* §§ 1-8; "*Death*," *Dec. Dig. (Key No.)* § 14; *Cent. Dig.* § 16.



**SAME—FORBIDDEN CONDUCT**

6. An action lies to recover damages for forbidden conduct by the person for whose benefit the conduct was forbidden, without proof that actual damage resulted. The law conclusively presumes damage.
7. Where conduct is forbidden for the benefit of the public,—that is, where a public duty is created,—an individual cannot maintain an action for its breach, unless he sustains special damage thereby.

For reasons essentially of public policy, to prevent breaches of the peace, and because its necessary or probable effect is damage to some one, the law absolutely forbids certain conduct. A duty is imposed on all members of the community to refrain from such conduct, and the correlative right to have them refrain arises on the part of those for whose benefit the duty is created. These rights correspond to "absolute rights" in the classification of those writers who divide rights into absolute rights and rights not to be harmed.<sup>66</sup> From their violation, the law conclusively presumes that some damage has resulted.<sup>67</sup> In this class of cases therefore, it is sufficient

"It is convenient to sometimes use the term "absolute rights" to designate the rights corresponding to forbidden conduct. There is no objection to the term if it is understood that it merely stands for specialized instances of the right to immunity from harm.

"Every injury imports a damage, though it does not cost the party one farthing." Lord Holt, in *Ashby v. White*, 2 Ld. Raym. 955. "I can very well understand that no action lies in case where there is *damnum absque injuria*; that is, where there is damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said (in a legal sense) that an action will not lie even in a case of a wrong or violation of a right, unless it is followed by some perceptible damage which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading I have considered it

to simply prove the conduct, proof of damage being relevant with respect to the amount of compensation recoverable, but not with respect to the existence of the cause of action. In all other cases the law indulges in no presumption, but leaves the party complaining of a wrong to prove it by showing the presence of both its essential elements—the conduct itself and the resulting damage. Cases of defamation afford a good illustration of the principle under discussion. Damage is such a probable consequence of certain slanderous and libelous statements that the law absolutely forbids them. These statements are said to be actionable *per se*. Proof of their utterance, without more, is sufficient to sustain an action, for the law presumes the damage.<sup>68</sup> Other false and defamatory

laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it, and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages." Justice Story, in *WEBB v. PORTLAND MFG. CO.*, 3 Sumn. 189, Fed. Cas. No. 17,323, Cooley, Cas. Damages, 13. When it is understood that the right violated is in all cases a right to immunity from harm, it will readily be conceded that "every injury imports damage in the nature of it;" but the phrase does not tell us a great deal, for the fact remains that in many cases damage must be proved to show an injury (wrong). The learned judge evidently referred to those absolute or specialized rights which are correlative to a prohibition. "Actual, perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable." Per Park, B., in *Embrey v. Owen*, 6 Exch. 353; *McLeod v. Boulton*, 3 U. C. Q. B. 84; *Whipple v. Cumberland Mfg. Co.*, 2 Story, 661, Fed. Cas. No. 17,516; *Bagby v. Harris*, 9 Ala. 173; *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75; *Cory v. Silcox*, 6 Ind. 39; *Little v. Stanback*, 63 N. C. 285. See "*Damages*," *Dec. Dig. (Key No.)* § 4; *Cent. Dig.* § 3.

<sup>68</sup> *Henkle v. Schaub*, 94 Mich. 542, 54 N. W. 293; *Smith v. Sun Printing & Pub. Ass'n*, 5 C. C. A. 91, 55 Fed. 240; *Wynne v. Parsons*, 57 Conn. 73, 17 Atl. 363; *Newell, Defam.* 181. To accuse one in print of lying is actionable *per se*. *Riley v. Lee*, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; *Prosser v. Callis*, 117 Ind. 105, 19 N. E. 735. So to call a man a "skunk," *Massuere v. Dickens*, 70 Wis. 83, 35 N. W. 349; or a "swindler," *Janson v. Stuart*, 1 Term. R. 748; *Smith v. Stewart*, 41 Minn. 7, 42 N. W. 595. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 32, 33; *Cent. Dig.* §§ 113, 277.

statements may cause harm, but the harm is not such a probable or necessary consequence. The law therefore does not specifically forbid such statements, and, to maintain an action therefor, both the words and the resulting damage must be proved.<sup>69</sup> Assaults, trespasses, and the like are illustrations of forbidden conduct. To enumerate every case in which damages will be presumed "would be to recapitulate the whole corpus juris."<sup>70</sup>

### *Public Wrongs*

Where a public duty is created—that is, where conduct is prohibited for the benefit of the community at large—an individual cannot maintain an action for its breach. The remedy is by indictment on behalf of the public. The law gives no private remedy for anything but a private wrong.<sup>71</sup> The reason is one of public policy, and is well stated by Lord Coke

\* *Ratcliffe v. Evans* [1892] 2 Q. B. 524; *Daniel v. New York News Pub. Co.*, 67 Hun, 649, 21 N. Y. Supp. 862; *Bradstreet Co. v. Gill*, 72 Tex. 119, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; *Brown v. Durham*, 3 Tex. Civ. App. 244, 23 S. W. 868; *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073. Defamatory words that harm no one, even if false, are not actionable; as where they were uttered in the presence of the slandered person only, *Sheffill v. Van Deusen*, 13 Gray (Mass.) 304, 74 Am. Dec. 632; or in a foreign language, which was not understood. *Kiene v. Ruff*, 1 Iowa, 482, *Burdick*, Lead. Cas. Torts, 215; *Wormouth v. Cramer*, 3 Wend. (N. Y.) 395, 20 Am. Dec. 706; *Townsh. Sland. & L.* (4th Ed.) 94; 1 *Starkie, Sland. & L.* 361. Defamatory words spoken by a lunatic, whose insanity was obvious, or known to all the hearers, are not actionable. *Dickinson v. Barber*, 9 Mass. 224–227, 6 Am. Dec. 72; *Bryant v. Jackson*, 6 Humph. (Tenn.) 199; *Yeates v. Reed*, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43. So, also, of words spoken or understood as a jest. *Donoghue v. Hayes* (Ir. Exch.) Hayes, 265. See, also, *Broderick v. James*, 3 Daly (N. Y.) 481; *Myers v. Dresden*, 40 Iowa, 660; *Van Rensselaer v. Dole*, 1 Johns. Cas. (N. Y.) 279; *Chase v. Whitlock*, 3 Hill (N. Y.) 139; *Sheffill v. Van Deusen*, 13 Gray (Mass.) 304, 74 Am. Dec. 632. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 12, 32, 33; *Cent. Dig.* §§ 97, 112, 277.

"Sedg. Dam. § 98.

"3 Bl. Comm. 219; 4 Bl. Comm. 167; *Broom, Leg. Max.* 206.

in regard to public nuisances.<sup>72</sup> "A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action, for, by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause." Where, however, the breach of a public duty results in special and peculiar damage to an individual, he may maintain an action, for all the elements of an actionable wrong are present, and no principle of public policy prevents.<sup>73</sup> It devolves upon plaintiff to bring himself within the exception. He must allege and prove that he has suffered special and peculiar damage. The law will not presume it.<sup>74</sup> The right to maintain the action does not depend on the number injured, but upon the personal character of the injury.<sup>75</sup> "If many persons receive a private injury by a public nuisance, everyone shall have his action."<sup>76</sup> The nature of the special dam-

<sup>72</sup> Williams' Case, 5 Coke, 72. See, also, Iveson v. Moore, 1 Salk. 15. See "Nuisance," *Dec. Dig. (Key No.)* §§ 71-75; *Cent. Dig.* §§ 163-184.

<sup>73</sup> "Where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise, from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action because it would cause such a multiplicity of suits as to be itself an intolerable evil. But when he sustains a special damage differing in kind from that which is common to others, as where he falls into a ditch unlawfully made in the highway, and hurts his horse, or sustains a personal injury, then he may bring his action." *Proprietors of Quincy Canal v. Newcomb*, 7 Metc. (Mass.) 276, 39 Am. Dec. 778. See "Nuisance," *Dec. Dig. (Key No.)* §§ 71, 72; *Cent. Dig.* §§ 163-169.

<sup>74</sup> *Winterbottom v. Derby*, L. R. 2 Exch. 316. See "Nuisance," *Dec. Dig. (Key No.)* §§ 72, 76; *Cent. Dig.* §§ 164-169, 185-188.

<sup>75</sup> *Cooley*, Torts, 102; *Henly v. Mayor, etc., of Lyme*, 5 Bing. 91, 3 Barn. & Adol. 77; *Nicholl v. Allen*, 1 Best & S. 936; *McKinnon v. Penson*, 8 Exch. 319; *King v. Richards*, 8 Term R. 634. See "Nuisance," *Dec. Dig. (Key No.)* §§ 71, 72; *Cent. Dig.* §§ 163-169.

<sup>76</sup> Per Holt, C. J., in *Ashby v. White*, *Ld. Raym.* 938, 955. See, also, Williams' Case, 5 Coke, 73; *Co. Litt.* 56a; *Corley v. Lancaster*, 81 Ky. 171. See "Nuisance," *Dec. Dig. (Key No.)* §§ 71-73; *Cent. Dig.* §§ 163-175.

age pertains rather to the right of action than the measure of damages, and with it we are not specially concerned.

**SAME—CONDUCT NEITHER AUTHORIZED NOR FORBIDDEN**

**8. An action may be maintained for damage caused by conduct which is neither authorized nor forbidden, provided it was.**

- (a) Malicious,
- (b) Negligent, or
- (c) Done at peril.

Between the two classes of conduct expressly authorized by law and conduct expressly forbidden, there is a third class, comprising the great mass of human actions, in which the conduct is neither expressly authorized nor forbidden, and in which liability for consequences must be referred directly to the great fundamental right of immunity from harm. This class corresponds to the second division in the classification of rights into absolute rights and rights not to be harmed. In it, damage is never presumed, but must be proved, or the violation of a right is not shown. The law, however, has not undertaken the impossible task of insuring against all harm. It recognizes the fact that unfortunate accidents will occur, for which no one is to blame, and wisely and justly, in most cases, leaves him to bear the loss upon whom it has fallen. The law, however, has pursued no consistent theory of liability.<sup>77</sup> Liability is recognized in three classes of cases: (1) Where the conduct was malicious; (2) where the conduct was negligent; and (3) where it was done at peril. In the first two classes, liability attaches on the theory of culpability. In the third class, it attaches on the theory that there is a duty to insure safety. Each class will be considered briefly.

<sup>77</sup> Jagg. Torts, 48. O. W. Holmes, Jr., in 7 Am. Law Rev. 652; Holmes, Com. Law, 79; Wabash, St. L. & P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193. See "Negligence," Dec. Dig. (Key No.) § 63; Cent. Dig. §§ 80, 81.

**9. MALICIOUS CONDUCT**—An action may be maintained for damages caused by an act done intentionally without just cause or excuse.

It is a legal wrong to do willful harm to another without just cause or excuse.<sup>78</sup> If there exists a right of immunity from harm, it is clear that the negative duty of not doing willful harm must also exist, subject to necessary exceptions. Thus, the prosecution in good faith of a groundless action is not a legal wrong to defendant, though he is put to large expense;<sup>79</sup> but, if the action is prosecuted maliciously and without probable cause, it is a legal wrong.<sup>80</sup> Fraud, deceit,

<sup>78</sup> Bowen, L. J., in *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. 598, [1892] App. Cas. 25, citing *Bromage v. Prosser*, 4 Barn. & C. 247; *Capital, etc., Bank v. Henty*, L. R. 7 App. Cas. 74. This statement avoids the common principles, for example, as in 1 Add. c. 1, § 9, p. 36 (40). "But every malicious act wrongful in itself in the eyes of the law, if it causes hurt or damage to another, is a tort, and may be the foundation of an action." An act wrongful in itself producing damage is naturally actionable. Generally, *Jagg. Torts*, 555; *Clerk & L. Torts*, 16; *Green v. Button*, 2 Crompt., M. & R. 707; *Cattle v. Stockton Waterworks Co.*, L. R. 10 Q. B. 43. An interesting article on the right to so maliciously exercise one's legal rights as to cause damage to others, and the remedy therefor, 58 J. P. 814. See "*Torts*," *Dec. Dig. (Key No.)* § 4; *Cent. Dig.* § 4.

<sup>79</sup> *Woodmansie v. Logan*, 2 N. J. Law, 86; *Muldoon v. Rickey*, 103 Pa. 110, 49 Am. Rep. 117; *Eberly v. Rupp*, 90 Pa. 259. And see *Coleman v. Lytle*, 49 Tex. Civ. App. 42, 107 S. W. 562. See "*Malicious Prosecution*," *Dec. Dig. (Key No.)* § 26; *Cent. Dig.* § 59.

<sup>80</sup> In an action for malicious prosecution, malice must be alleged and proved. *Saxon v. Castle*, 6 Adol. & El. 652; *Page v. Wiple*, 3 East, 314; *Vanduzor v. Linderman*, 10 Johns. (N. Y.) 106. *Emerson v. Cochran*, 111 Pa. 619, 4 Atl. 498. Malice is a distinct issue. *Smith v. Maben*, 42 Minn. 516, 44 N. W. 792; *Cooper v. Hart*, 147 Pa. 594, 23 Atl. 833. The burden of proving malice is on the plaintiff. 2 Greenl. Ev. § 449; *Barton v. Kavanaugh*, 12 La. Ann. 332; *Mitchell v. Jenkins*, 5 Barn. & Adol. 588; *Whalley v. Pepper*, 7 Car. & P. 506; *Walker v. Cruikshank*, 2 Hill (N. Y.) 297; *Melvin v. Chancy*, 8 Tex. Civ. App. 252, 28 S. W. 241; *Barber v. Scott*, 92 Iowa, 52, 60 N. W. 497; *Welsh v. Cheek*, 115 N. C. 310, 20 S. E. 460; *Womack v. Fudikar*, 47 La. Ann. 33, 16 South. 645. See "*Malicious Prosecution*," *Dec. Dig. (Key No.)* § 26; *Cent. Dig.* § 59.

conspiracy, strikes, boycotts, malicious interference with contract, and the like, are examples of conduct wrongful in law, because of malice and resulting damage. If either is absent, the wrong is not complete.<sup>81</sup>

**10. NEGLIGENT CONDUCT—An action may be maintained for damage caused by negligent conduct.**

The law imposes the general duty of exercising due care to avoid harm. Whenever damage results from a failure to exercise such care, a legal wrong is committed. Negligence which does not result in damage is not wrongful in law. "Mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused."<sup>82</sup> The principles involved in this class of cases are too familiar to require discussion here.<sup>83</sup>

**11. CONDUCT AT PERIL—An action may sometimes be maintained for damage caused by conduct which is neither malicious nor negligent. The duty to avoid harm is regarded as absolute.**

"Perhaps the commonest conception of liability in tort is expressed by the classical phrase that a man acts at his peril. He insures the world against wrong on his part. The duty to avoid harm to others is regarded as absolute. Breach of that duty, and consequent damage, are sufficient to create responsibility without reference to his mental attitude; that is, his consciousness or intention. This view of the law had its origin in the early Germanic conceptions of liability. These conceptions inclined to the position that, whenever harm was done, some one must be held responsible. There was no

<sup>81</sup> Jagg. Torts, c. 9, "Malicious Wrongs."

<sup>82</sup> *Brunsdon v. Humphrey*, 14 Q. B. Div. 141, 150. See "Action," *Dec. Dig. (Key No.)* §§ 1, 2; *Cent. Dig.* §§ 1-16.

<sup>83</sup> For a discussion of the principles of liability for negligence, see Jagg. Torts, c. 12.

definite logic in the selection of the victim. The primitive notion instinctively visited liability on the visible offending cause, whatever it might be, of a visible evil result."<sup>84</sup> Acts complained of as nuisances are perhaps the best illustration of acts done at peril. Liability is not at all dependent upon either care or motive.<sup>85</sup> Absolute liability is also recognized in a class of cases of which *Fletcher v. Rylands*<sup>86</sup> is a type. In these cases liability for damage is dependent neither upon malice nor negligence, but upon the ownership, use, custody, or control of some dangerous instrumentality.<sup>87</sup> Critical modern investigation is questioning and denying the doctrine of absolute liability, and many exceptions are recognized by the courts.<sup>88</sup>

<sup>84</sup> Jagg. Torts, p. 49.

<sup>85</sup> *Upjohn v. Board*, 46 Mich. 542, 9 N. W. 845, 41 Am. St. Rep. 178; *Cairncross v. Village of Pewaukee*, 86 Wis. 181, 56 N. W. 648; *Lamming v. Galusha*, 135 N. Y. 239, 31 N. E. 1024. The use of ordinary skill and caution in the construction of work (as draining surface water) will not protect from liability, if there has been a failure to provide against any damage which might have been foreseen. *Staton v. Norfolk & C. R. Co.*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838. Cf. *Gulf, C. & S. F. Ry. Co. v. Steele* (Tex. Civ. App.) 26 S. W. 926. Contributory negligence is ordinarily no defense to a nuisance. *Philadelphia & R. R. Co. v. Smith*, 12 C. C. A. 384, 64 Fed. 679, 27 L. R. A. 131. Cf. *Willis v. City of Perry*, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124. See "Nuisance," *Dec. Dig. (Key No.)* § 2; *Cent. Dig.* § 2.

<sup>86</sup> L. R. 1 Exch. 265. Cf. *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623. See "Negligence," *Dec. Dig. (Key No.)* §§ 16-27; *Cent. Dig.* §§ 19-25.

<sup>87</sup> Things dangerous in themselves may be regarded from the point of view of nuisance, negligence, or breach of duty to insure safety. *Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co. (C. C.)* 42 Fed. 273-281, 12 L. R. A. 544. The opinion of Brown, J., in this case is eminently clear and able. *Van Norden v. Robinson*, 45 Hun (N. Y.) 567. For an able discussion of liability in this class of cases, see Jagg. Torts, p. 832, et seq. See "Negligence," *Dec. Dig. (Key No.)* §§ 16-27; *Cent. Dig.* §§ 19-25.

<sup>88</sup> Jagg. Torts, 53; *Pig. Torts*, c. 7; *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Harvey v. Dunlop*, *Lalor's Supp. (N. Y.)* 193; *Nitro-Glycerine Case*, 15 Wall. 524, 21 L. Ed. 206; *Lansing v. Stone*, 37 Barb. (N. Y.) 15; *Center v. Finney*, 17 Barb. (N. Y.) 94; *Morris*



### SUMMARY

The substance of much of the foregoing discussion may be summarized in the following analysis of a legal wrong:

#### ANALYSIS OF LEGAL WRONGS

**12. A legal wrong is committed whenever**

**(a) Conduct which is either**

- (1) Forbidden,**
- (2) Malicious,**
- (3) Negligent, or**
- (4) Done at peril**

**(b) Results in damage, which may be either**

- (1) Actual or**
- (2) Presumed.**

#### CLASSIFICATION OF DAMAGES

**13. With respect to their object, damages may be divided into**

- (a) Compensatory damages and**
- (b) Exemplary damages.**

**14. With respect to amount, compensatory damages may be divided into**

- (a) Nominal damages and**
- (b) Substantial damages.**

v. Platt, 33 Conn. 75; Paxton v. Boyer, 67 Ill. 133, 16 Am. Rep. 615; Dygert v. Bradley, 8 Wend. (N. Y.) 470; 1 Hill, Torts, c. 5, § 9; 2 Greenl. Ev. 85. See, also, Holmes v. Mather, L. R. 10 Exch. 261; Stanley v. Powell [1891] Q. B. Div. 86. See "*Negligence*," *Dec. Dig. (Key No.)* §§ 16-227; *Cent. Dig.* §§ 19-25.

## CHAPTER II

## NOMINAL DAMAGES

## 15-17. Definition and General Nature.

## DEFINITION AND GENERAL NATURE

15. Nominal damages are damages insignificant in amount; a sum of money that can be spoken of, but has no existence in point of quantity.
16. Nominal damages are awarded only in cases where the law presumes damage. Whenever the law presumes damage, it presumes the lowest possible amount; that is, nominal damages.
17. Whenever damages must be proved to show the violation of a legal right, proof of nominal damage will not support an action. The law applies the maxim, "De minimis non curat lex."

It is a fundamental principle of the law of damages that, whenever one's rights have been invaded, he is entitled to compensation proportional to the amount of the injury.<sup>1</sup> The extent of actual injury is usually a question of fact.<sup>2</sup> In the absence of proof, the law can seldom say that a given wrong has resulted in damage of a definite amount. But, as has been seen, in many, and perhaps most, cases, proof of damage is

<sup>1</sup> Sedg. Dam. 38; Suth. Dam. 18. "It is a rational and legal principle that the compensation should be equivalent to the injury." *Bussy v. Donaldson*, 4 Dall. 206, 1 L. Ed. 802. "It is a general and very sound rule of law that, where an injury has been sustained for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." *Rockwood v. Allen*, 7 Mass. 254. See "Damages," *Dec. Dig. (Key No.)* §§ 15, 16; *Cent. Dig.* §§ 34-36.

<sup>2</sup> Ante, p. 8. See "Damages," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 54, 64, 533, 534.

essential to the proof of a legal wrong.<sup>3</sup> In current phraseology, damages are the gist of the action. In this class of cases, the law awards the amount of damages that have been proved. But there is another class of cases, in which damages are not the gist, and need not be proved, because they are presumed by law. This occurs, for instance, whenever the conduct complained of is absolutely forbidden.<sup>4</sup> And generally wherever there is a breach of an agreement on the invasion of a right, though no actual damage is or can be shown, the legal presumption remains,<sup>5</sup> and the person injured is entitled to nominal damages.<sup>6</sup> But the presumption is only that some damage has resulted; the law cannot presume a definite amount. "This requires some practical expression as the compensation for a technical injury. Therefore, nominal damages are given, as

<sup>3</sup> Ante, p. 9. See "*Action*," *Dec. Dig. (Key No.)* §§ 1, 2; *Cent. Dig.* §§ 1-16.

<sup>4</sup> Ante, p. 20. See "*Damages*," *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* § 3.

<sup>5</sup> *WEBB v. PORTLAND MFG. CO.*, 3 Sumn. 189, Fed. Cas. No. 17,322, Cooley, Cas. Damages, 13; *Lafin v. Willard*, 16 Pick. (Mass.) 64, 26 Am. Dec. 629; *Lawrence v. Rice*, 12 Metc. (Mass.) 536; *Whittemore v. Cutter*, 1 Gall. 429, 433, Fed. Cas. No. 17,600; *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75; *Mechem, Cas. Dam.* 8. In *Ashby v. White*, Ld. Raym. 938, 958, where plaintiff had been deprived of a right to vote, Lord Holt, answering the objection that plaintiff had suffered no damage, said: "This action is brought by the plaintiff for the infringement of his franchise. You would have nothing to be a damage but what is pecuniary, and a damage to property;" but "a damage is not merely pecuniary, but an injury imports a damage where a man is thereby hindered of his right." See, also, *Adams v. Robinson*, 65 Ala. 586; *McConnell v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Graver v. Sholl*, 42 Pa. 58. See "*Damages*," *Dec. Dig. (Key No.)* § 4; *Cent. Dig.* § 3.

<sup>6</sup> *DOUGLASS v. OHIO RIVER R. CO.*, 51 W. Va. 523, 41 S. E. 911, Cooley, Cas. Damages, 8; *Browning v. Simons*, 17 Ind. App. 45, 46 N. E. 86; *Bourdette v. Seward*, 107 La. 258, 31 South. 630; *STATE ex rel. LOWERY v. DAVIS*, 117 Ind. 307, 20 N. E. 159, Cooley, Cas. Damages, 9; *Wells v. Watling*, 2 W. Bl. 1233; *Adams v. Robinson*, 65 Ala. 586; *Browner v. Davis*, 15 Cal. 9; *Cowley v. Davidson*, 10 Minn. 392 (Gil. 314); *Devendorf v. West*, 42 Barb. (N. Y.) 227; *Pierce v. Hosmer*, 66 Barb. (N. Y.) 345; *Cardwill v. Gilmore*, 86 Ind. 428. See "*Damages*," *Dec. Dig. (Key No.)*, §§ 8-13; *Cent. Dig.* §§ 7-33.

six cents, a penny, or a farthing—a sum of money that can be spoken of, but has no existence in point of quantity. Verdicts and judgments for nominal damages generally specify a small sum which may be paid.”<sup>7</sup> It is only in cases where damages are not of the gist—that is, in cases of forbidden conduct—that nominal damages can be recovered;<sup>8</sup> for it is only in this class of cases that a legal wrong can be shown without proof of actual damage. If substantial damage is shown, an equivalent amount is awarded, and the principle of nominal damages is not involved. The actual damage shown, however small, may be recovered.<sup>9</sup> If there is in fact no damage,<sup>10</sup> but

<sup>7</sup> *Suth. Dam.* 18. “Where the law implies the injury, it also implies the lowest damage.” *Pastorius v. Fisher*, 1 *Rawle* (Pa.) 27. And see *Ripka v. Sergeant*, 7 *Watts & S.* (Pa.) 9, 42 *Am. Dec.* 214. Where a party fails to furnish ore to a smelting company for reduction at a fixed price, the company cannot recover more than nominal damages, where the quality of the ore was not fixed, unless they prove the profits of the smelting of whatever grade might be furnished. *Patrick v. Colorado Smelting Co.*, 20 *Colo. Sup.* 489, 38 *Pac.* 236. See, also, *Fraser v. Echo Mining & Smelting Co.*, 9 *Tex. Civ. App.* 210, 28 *S. W.* 714. See “*Damages*,” *Dec. Dig. (Key No.)* § 14; *Cent. Dig.* § 356.

<sup>8</sup> In *Brown v. Watson*, 47 *Me.* 161, 74 *Am. Dec.* 482, it was held that for an injury to a private person, however inconsiderable, he may maintain an action. The plaintiff in that case had been compelled to take a circuitous route, because of obstructions placed in the road. He was allowed to recover. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 8-12; *Cent. Dig.* §§ 7-33.

<sup>9</sup> Defendant may attempt “not to defeat the action altogether, but to restrict the amount of damages recovered to a nominal sum, by proving that the injury itself has not been substantial. The question involved in such cases is really one of compensation purely. If no substantial loss can be proved, the plaintiff must be restricted to nominal damages.” *Sedg. Dam.* 149; *Freese v. Crary*, 29 *Ind.* 524; *Carl v. Granger Coal Co.*, 69 *Iowa*, 519, 29 *N. W.* 437; *Thorp v. Bradley*, 75 *Iowa*, 50, 39 *N. W.* 177; *Bruce v. Pettengill*, 12 *N. H.* 341; *D’Orval v. Hunt*, *Dud. (S. C.)* 180; *Tully v. Fitchburg R. Co.*, 134 *Mass.* 500. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 10-12; *Cent. Dig.* §§ 7-33.

<sup>10</sup> *Mellor v. Spateman*, 1 *Saund.* 346b; *Brant v. Gallup*, 111 *Ill.* 487, 53 *Am. Rep.* 638; *Cook v. Hull*, 3 *Pick. (Mass.)* 269, 15 *Am. Dec.* 208; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 *Pick. (Mass.)* 241; *Stowell v. Lincoln*, 11 *Gray (Mass.)* 434; *Pollard v. Porter*, 3 *Gray (Mass.)* 312; *Pond v. Merrifield*, 12 *Cush. (Mass.)* 181;

rather a benefit,<sup>11</sup> nominal damages are, nevertheless, allowed.

*Shattuck v. Adams*, 136 Mass. 34; *Newcomb v. Wallace*, 112 Mass. 25; *Marzetti v. Williams*, 1 Barn. & Adol. 412; *Warre v. Calvert*, 7 Adol. & E. 143. *Embréy v. Owen*, 6 Exch. 352; *Northam v. Hurley*, 1 El. & Bl. 663; *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Burnap v. Wight*, 14 Ill. 301; *Dent v. Davison*, 52 Ill. 109; *Graver v. Sholl*, 42 Pa. 58; *Delaware & H. Canal Co. v. Torrey*, 33 Pa. 143; *Chamberlain v. Parker*, 45 N. Y. 569; *Dixon v. Clow*, 24 Wend. (N. Y.) 188; *Quin v. Moore*, 15 N. Y. 432; *McIntyre v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 532; *Ihl v. Forty-Second St. & G. St. F. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401; *Eaton v. Lyman*, 30 Wis. 41; *Adams v. Robinson*, 65 Ala. 586; *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406, 7 Pac. 810; *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Mize v. Glenn*, 38 Mo. App. 98; *Jones v. Hannovan*, 55 Mo. 462. "The action may be maintained to vindicate the rights." *Per Justice Story*, in *WEBB v. PORTLAND MFG. CO.*, 3 Sumn. 189, Fed. Cas. No. 17,322, Cooley, Cas. Damages, 13. It is sometimes said that the violation of a right with a possibility of damage is sufficient to maintain an action. *Ross v. Thompson*, 78 Ind. 90; *Allaire v. Whitney*, 1 Hill (N. Y.) 484. See *Whitney v. Allaire*, 4 Denio (N. Y.) 554. But this is meaningless. If the right violated is an absolute one, damage need not be proved. If it is the fundamental right not to be harmed, damage must be proved in order to show a violation of the right. In *Allaire v. Whitney*, 1 Hill (N. Y.) 484, it was held to be actionable per se to draw one into a contract by fraud. The court said: "Indeed, in all such cases it would not be difficult to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing, or one comparatively vain; and time is money. Fraud is odious to the law; and fraud in a contract can hardly be conceived of without being attended with damage in fact." Refusal by banker to pay check. *Marzetti v. Williams*, 1 Barn. & Adol. 415; *Winterbottom v. Wright*, 10 Mees. & W. 107. See, also, *Rolin v. Steward*, 14 C. B. 595, where actual damages were given. The omission of an administrator to settle his accounts with the probate court renders him liable for nominal damages at all events. *Webb v. Gross*, 79 Me. 224, 9 Atl. 612; *Fay v. Haven*, 3 Metc. (Mass.) 109; *McKim v. Bartlett*, 129 Mass. 226; *Probate Court for District of Rutland v. Slason*, 23 Vt. 306. *Contra*, *Olmstead v. Brush*, 27 Conn. 520. A riparian owner may recover nominal damages for a bare infringement of his rights. *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 South. 78, 4 L. R. A.

<sup>11</sup> See note 11 on following page.

*De Minimis Non Curat Lex*

The oft-quoted, but little understood, maxim, "De minimis non curat lex," does not prohibit the allowance of nominal damages.<sup>12</sup> Keeping clearly in mind the fundamental idea that

572, 11 Am. St. Rep. 72; *Lund v. City of New Bedford*, 121 Mass. 286; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Shannon v. Burr*, 1 Hilt. (N. Y.) 39; *Champion v. Vincent*, 20 Tex. 811. But see *Cory v. Silcox*, 6 Ind. 39; *McElroy v. Goble*, 6 Ohio St. 187; *Wood v. Waud*, 3 Exch. 748. Nominal damages may be recovered for the unlawful flowage of lands, *Chapman v. Copeland*, 55 Miss. 476; *Gerrish v. New Market Mfg. Co.*, 30 N. H. 478; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; or for false imprisonment, *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242. In England it is held that, in an action against a public officer for neglect of duty, the plaintiff must show damage. The right which every man has to the services of such officer is relative to the benefit to be derived therefrom. The right and benefit are co-extensive; and, if the benefit is negatived, the right ceases. *Wood, Mayne, Dam. 11*; *Pig. Torts*, p. 129; *Wylie v. Birch*, 4 Q. B. 566; *Williams v. Mostyn*, 4 Mees. & W. 145; *Stimson v. Farnham*, L. R. 7 Q. B. 175; *Hobson v. Thellusson*, L. R. 2 Q. B. 642. In America it is generally held that the officer is liable without proof of damage. *STATE ex rel. LOWERY v. DAVIS*, 117 Ind. 307, 20 N. E. 159; *Cooley, Cas. Damages*, 9. "The plaintiff is entitled to nominal damages for the officer's neglect. \* \* \* No actual damages are proved, but, where there is neglect of duty, the law presumes damage." *Laffin v. Willard*, 16 Pick. (Mass.) 64, 26 Am. Dec. 629. See, also, *Goodnow v. Willard*, 5 Metc. (Mass.) 517; *Lawrence v. Rice*, 12 Metc. (Mass.) 535; *Mickles v. Hart*, 1 Denio (N. Y.) 548; *Patterson v. Westervelt*, 17 Wend. (N. Y.) 543; *Palmer v. Gallup*, 16 Conn. 555; *Crawford v. Andrews*, 6 Ga. 244. See "*Damages*," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* § 15.

<sup>12</sup> *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Jewett v. Whitney*, 43 Me. 242; *Jones v. Hannovan*, 55 Mo. 463; *MURPHY v. CITY OF FOND DU LAC*, 23 Wis. 365, 99 Am. Dec. 181; *Cooley, Cas. Damages*, 132; *Stowell v. Lincoln*, 11 Gray (Mass.) 434; *Gile v. Stevens*, 13 Gray (Mass.) 146; *Francis v. Schoellkopf*, 53 N. Y. 152. See "*Damages*," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* § 15.

<sup>13</sup> *WARTMAN v. SWINDELL*, 54 N. J. Law, 589, 25 Atl. 356, 18 L. R. A. 44; *Cooley, Cas. Damages*, 10; *Fullam v. Stearns*, 30 Vt. 443. "This maxim is never applied to the positive and wrongful (i. e. forbidden) invasion of another's property. To warrant an action in such a case, says a learned writer, 'some temporal damage, be it more or less, must actually have resulted, or must

all legal rights are rights to immunity from harm, the proper application of the maxim is easily understood. The law is a practical science, adapted to the needs and conditions of everyday life. It does not attempt to insure men against all harm. Trifling vexations and losses incident to existence in a social state must be borne. The law will not countenance litigation over what is insignificant, for mere purposes of vexation. But nominal damages are given only in cases where the defendant has been guilty of forbidden conduct, or, in other words, when an absolute right has been violated. What the law has considered important enough to forbid cannot be regarded as a trifle. To require proof of substantial damages would in many cases nullify the prohibition, and destroy the right, by taking away the remedy for its violation. The maxim has no application to this class of cases, and it is only in this class of cases that nominal damages are ever awarded. Where, however, damages are not presumed, but must be proved—that is, where the right directly involved is the fundamental right of immunity from harm, and not a specialized or absolute right correlative to a prohibition—proof of merely nominal damages will not support an action. Here alone is the maxim, “De minimis non curat lex” properly applied to take away a right of action. The law no longer distinguishes between no appreciable damage and no damage at all.<sup>13</sup>

#### *Nominal Damages Establish Rights*

The principal purpose of allowing nominal damages is the establishment of rights. As has been seen, a denial of nomi-

be likely to ensue. The degree is wholly immaterial; nor does the law upon every occasion require distinct proof that an inconvenience has been sustained. For example, if the hand of A. touch the person of B., who shall declare that pain has not ensued? The only mode to render B. secure is to infer that an inconvenience has actually resulted.” *Seneca Road Co. v. Auburn & R. R. Co.*, 5 Hill (N. Y.) 170, 175. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 8-14; *Cent. Dig.* §§ 7-33.

<sup>13</sup> *McALLISTER v. CLEMENT*, 75 Cal. 182, 16 Pac. 775, Cooley, *Cas. Damages*, 12; *St. Helen’s Smelting Co. v. Tijing*, 11 H. L. Cas. 642; *Smith v. Thackerah*, L. R. 1 C. P. 564; *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 8-14; *Cent. Dig.* §§ 7-33.

nal damages in all cases when no actual damages can be proved would often be a denial of those specialized or absolute rights which grow out of forbidden conduct. A fortiori, an action must lie "whenever the act done is of such a nature as that, by its repetition or continuance, it may become the foundation or evidence of an adverse right."<sup>14</sup> A judgment for the smallest conceivable sum is as effective for declaring the existence or nonexistence of a right as any sum, however large.<sup>15</sup> Illustrations of actions brought to establish rights in which nominal damages were awarded might be multiplied indefinitely. A few will suffice. In the *Tunbridge Wells Dipper's Case*<sup>16</sup> the defendant had dipped water without having been chosen for the post by the homage according to statute. It was not proved that she had received any gratuity, but the plaintiffs were held entitled to nominal damages, in order to prevent the possibility of damage. In *Patrick v. Greenway*<sup>17</sup> the defendant fished in the plaintiff's several fisheries, but caught nothing. Plaintiff was nevertheless held entitled to a verdict because of the infringement of the right, which could thereafter be used as

\* *WEBB v. PORTLAND MFG. CO.*, 3 Sumn. 189, Fed. Cas. No. 17,322, Cooley, Cas. Damages, 13. "Generally, when one encroaches upon the inheritance of another, the law gives a right of action; and, even if no actual damages are found, the action will be sustained, and nominal damages recovered, because, unless that could be done, the encroachments acquiesced in might ripen into legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title." *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167. See, also, *Seidensparger v. Spear*, 17 Me. 123, 35 Am. Dec. 234; *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401. See "Damages," *Dec. Dig. (Key No.)* §§ 8-14; *Cent. Dig.* §§ 7-33.

\* *Patrick v. Greenaway*, 1 Saund. 346b, note; *Devendorf v. Wert*, 42 Barb. (N. Y.) 227; *Bassett v. Salisbury Mfg. Co.*, 8 Fost. (N. H.) 438; *Thomas v. Brackney*, 17 Barb. (N. Y.) 654; *Carhart v. Auburn Gas Light Co.*, 22 Barb. (N. Y.) 297; *Honsee v. Hammond*, 39 Barb. (N. Y.) 89; *O'Riley v. McChesney*, 3 Lans. (N. Y.) 278; *Delaware & H. Canal Co. v. Torrey*, 33 Pa. 143. See "Damages," *Dec. Dig. (Key No.)* §§ 8-14; *Cent. Dig.* §§ 7-33.

\* *Weller v. Baker*, 2 Wils. 414. See "Damages," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 31.

\* Cited in note to *Mellor v. Spateman*, 1 Saund. 346b. See "Damages," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 31.



evidence of the exercise of the right by defendant. In *Bower v. Hill*<sup>18</sup> the plaintiff's right of way on a stream was obstructed, but the damage was problematical on account of the state of the stream. Plaintiff was held entitled to nominal damages, because acquiescence in the obstruction would be evidence of a renunciation of the right of way. In *Blofeld v. Payne*<sup>19</sup> the defendant imitated the plaintiff's hones, and the envelopes in which they were sold, thereby infringing his right. Plaintiff was allowed to recover, although no loss of custom was shown. In all these cases the conduct of defendant was expressly forbidden. A denial of nominal damages would have been a denial of the right for the purpose of creating which the conduct was forbidden.

#### *New Trials and Costs*

The importance of the right to recover nominal damages often consists in its effect on costs.<sup>20</sup> Where plaintiff is entitled to nominal damages, but judgment is given for defendant, it will be reversed, if nominal damages will entitle plaintiff to costs;<sup>21</sup> otherwise not,<sup>22</sup> for the error is harm-

<sup>18</sup> 1 Bing. N. C. 549.

<sup>19</sup> 4 Barn. & Adol. 410. See "*Damages*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 31.

<sup>20</sup> In admiralty, where the costs are in the discretion of the court, nominal damages are not always given for a technical wrong. *Barnett v. Luther*, 1 Curt. 434, Fed. Cas. No. 1,025. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1171; *Cent. Dig.* §§ 4553, 4554.

<sup>21</sup> *POTTER v. MELLEN*, 36 Minn. 122, 30 N. W. 438; *Cooley, Cas. Damages*, 16; *Enos v. Cole*, 53 Wis. 235, 10 N. W. 377; *Sayles v. Bemis*, 57 Wis. 315, 15 N. W. 432; *Eaton v. Lyman*, 30 Wis. 41; *French v. Ramge*, 2 Neb. 254; *Chambers v. Frazier*, 29 Ohio St. 362; *Seat v. Moreland*, 7 Humph. (Tenn.) 575; *Middleton v. Jerdee*, 73 Wis. 39, 40 N. W. 629; *East Moline Co. v. Weir Plow Co.*, 37 C. C. A. 62, 95 Fed. 250; *Stevens v. Yale*, 113 Mich. 680, 72 N. W. 5; *Heater v. Pearce*, 59 Neb. 583, 81 N. W. 615. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1171; *Cent. Dig.* §§ 4553, 4554.

<sup>22</sup> *JONES v. KING*, 33 Wis. 422; *Cooley, Cas. Damages*, 17; *New Orleans, M. & T. R. Co. v. Southern & A. Tel. Co.*, 53 Ala. 211; *McALLISTER v. CLEMENT*, 75 Cal. 182, 16 Pac. 775; *Cooley, Cas. Damages*, 12; *Ely v. Parsons*, 55 Conn. 83,

less.<sup>23</sup> But error in denying nominal damages is not always harmless, even if they do not entitle to costs. Regard must be had to the real purpose and object of the suit. If it was instituted to try some question of permanent right, and the party is found entitled to that right, but it happens that only nominal damages can be given, there is no objection to giving a new trial, for the error is not harmless; but if the party has failed in the substantial object of the suit, and has left only a bare technical right to recover nominal damages, a new trial will not be awarded him for that purpose.<sup>24</sup> Thus, it was held, in an action of trespass against a selectman for cutting trees alleged to obstruct a highway, where the main object of the action was to determine whether or not there had been a dedication of such highway, and the question of dedication was found in favor of the defendant, that error of the trial court in refusing the plaintiff nominal damages for the trees improperly cut was not ground for a new trial.

The court said: "The complaint in this suit was manifestly brought to determine whether the plaintiff had a right to the land which was in use for a highway. If error had intervened

101, 10 Atl. 499; *Green v. Macy*, 36 Ind. App. 560, 76 N. E. 264; *Clark v. American Express Co.*, 130 Iowa, 254, 106 N. W. 642; *McIntosh v. Lee*, 57 Iowa, 356, 10 N. W. 895; *Thorp v. Bradley*, 75 Iowa, 50, 39 N. W. 177; *Faulkner v. Closter*, 79 Iowa, 15, 44 N. W. 308; *Haven v. Beidler Mfg. Co.*, 40 Mich. 286; *Harris v. Kerr*, 37 Minn. 537, 35 N. W. 379; *Sloggy v. Crescent Creamery Co.*, 72 Minn. 316, 75 N. W. 225; *French v. Ramge*, 2 Neb. 254; *Middleton v. Jerdee*, 73 Wis. 39, 40 N. W. 629; *Benson v. President, etc., of Village of Waukesha*, 74 Wis. 31, 41 N. W. 1017; *Hecht v. Harrison*, 5 Wyo. 279, 40 Pac. 306; *Crawford v. Bergen*, 91 Iowa, 675, 60 N. W. 205. Where nominal damages are found on insufficient evidence, a new trial will not be granted. *Maher v. Winona & St. P. R. Co.*, 31 Minn. 401, 18 N. W. 105. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1171; *Cent. Dig.* §§ 4553, 4554.

<sup>23</sup> *Singer Mfg. Co. v. Potts*, 59 Minn. 240, 61 N. W. 23. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1171; *Cent. Dig.* §§ 4553, 4554.

<sup>24</sup> *Knowles v. Steele*, 59 Minn. 452, 61 N. W. 557. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1171; *Cent. Dig.* §§ 4553, 4554; "*Damages*," *Cent. Dig.* § 16.

tending to defeat him in the establishment of this right, the finding that his damages were merely nominal would have constituted no objection to a new trial. But the plaintiff entirely failed in the real object of the suit, but, by reason of the accidental cutting of some brush and trees not necessary to make the highway passable, he has a bare technical right to nominal damages. But substantial justice has been done. That a new trial must be denied under these circumstances is abundantly sustained by the uniform tenor of the decisions in this state and elsewhere." <sup>25</sup>

<sup>25</sup> *Ely v. Parsons*, 55 Conn. 83, 101, 10 Atl. 499. See, also, *Merrill v. Dibble*, 12 Ill. App. 85; *Shipman v. Horton*, 17 Conn. 487; *Gold v. Ives*, 29 Conn. 123; *Cooke v. Barr*, 39 Conn. 306; *Briggs v. Morse*, 42 Conn. 260; *Hyatt v. Hood*, 3 Johns (N. Y.) 239; *Hudspeth v. Allen*, 26 Ind. 165; *Plumleigh v. Dawson*, 1 Gilman (Ill.) 544, 41 Am. Dec. 199. On general subject of nominal damages, see, also, *Ashby v. White*, 2 Ld. Raym. 938; *Kidder v. Barker*, 18 Vt. 454; *Clifton v. Hooper*, 6 Q. B. 468; *Baker v. Green*, 2 Bing. 317; *Williams v. Mostyn*, 4 Mees. & W. 148; *Young v. Spencer*, 10 Barn. & C. 145; *Embrey v. Owen*, 6 Exch. 353, 372; *Williams v. Esling*, 4 Pa. 486, 45 Am. Dec. 710; *Seneca Road Co. v. Auburn & R. R. Co.*, 5 Hill (N. Y.) 175; *Bustamente v. Stewart*, 55 Cal. 115. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1171; *Cent. Dig.* §§ 4553, 4554; "*Damages*," *Cent. Dig.* § 16.

## CHAPTER III

## COMPENSATORY DAMAGES

- 18. Definition.
- 19-20. Proximate and Remote Consequences in General.
- 21. Direct and Consequential Losses.
- 22-23. Direct Losses.
- 24-25. Consequential Losses.
- 26. Proximate and Remote Consequential Losses.
- 27. Compensation for Consequential Losses.
- 28. Consequential Damages for Torts.
- 29. Consequential Damages for Breach of Contract.
- 30. Avoidable Consequences.
- 31. The Required Certainty of Damages.
- 32. Profits or Gains Prevented.
- 33. Entirety of Demand.
- 34. Time to Which Compensation May Be Recovered—Past and Future Losses.
- 35-36. Elements of Compensation.
- 37. Pecuniary Losses.
- 38-39. Physical Pain and Inconvenience.
- 40-41. Mental Suffering.
- 42. Aggravation and Mitigation of Damages.
- 43-45. Reduction of Loss.
- 46. Injuries to Limited Interests.

## DEFINITION

- 18. Compensatory damages are damages sufficient in amount, in contemplation of law, to indemnify the person injured for the loss suffered.**

The cardinal principle governing the award of damages in both cases of tort and breach of contract is that the person injured shall receive compensation commensurate with his loss or injury;<sup>1</sup> the general rule being that whoever does an injury

<sup>1</sup> *Hutchison v. Town of Summerville*, 66 S. C. 442, 45 S. E. 8; *Sanders v. McKim*, 138 Iowa, 122, 115 N. W. 917; *Prestwood v. Carlton*, 162 Ala. 327, 50 South. 254; *Talbott v. West Virginia, C. & P. Ry. Co.*, 42 W. Va. 560, 26 S. E. 311. See "Damages," *Dec. Dig. (Key No.)* § 15; *Cent. Dig.* § 1.

to another is liable in damages to the extent of that injury.<sup>3</sup>

The object of the law in awarding damages for civil injury and breach of contract is to put the person injured, so far as money can do it, in the same position as he would have been in if there had been no injury or breach; that is, to compensate him for the injury actually sustained.<sup>3</sup> But legal compensation often falls far short of actual indemnity.<sup>4</sup> The law does not and cannot give compensation for all the consequences of a wrongful act, nor can damages be recovered for mere inconvenience, vexation, or disappointment.<sup>5</sup> The law prescribes

<sup>3</sup> *Dexter v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,867. "It is a rational and a legal principle that the compensation should be equivalent to the injury." *Bussy v. Donaldson*, 4 Dall. 206, 1 L. Ed. 802. "It is a general and very sound rule of law that when an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained." *Rockwood v. Allen*, 7 Mass. 254. "By the general system of our law, for every invasion of right there is a remedy, and that remedy is compensation. This compensation is furnished in the damages which are awarded." Sedg. Dam. 28. See "*Damages*," *Dec. Dig. (Key No.)* § 15; *Cent. Dig.* § 1.

<sup>4</sup> *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374. See "*Damages*," *Dec. Dig. (Key No.)* § 15; *Cent. Dig.* § 1.

<sup>5</sup> "It has been contended that the true measure of damages, in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non-payment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment." *Tilghman, C. J.*, in *Bender v. Fromberger*, 4 Dall. 436, 444, 1 L. Ed. 898. "Every defendant against whom an action is brought experiences some injury or inconvenience beyond what the costs will compensate for him." *Brom, Leg. Max.* 199. "But, although the law does not attempt the impossibility of replacing the plaintiff in exactly the position he was in before the injury, yet, within the bounds of possibility, its aim is compensation." Sedg. Dam. 50. See "*Damages*," *Dec. Dig. (Key No.)* §§ 15, 30; *Cent. Dig.* §§ 1, 222.

<sup>6</sup> *TURNER v. GREAT NORTHERN RY. CO.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883, *Cooley, Cas. Damages*, 105; *BALTIMORE & O. R. CO. v. CARR*, 71 Md. 135, 17 Atl. 1052, *Cooley, Cas. Damages*, 204. "The injury must be physical, as distinguished from one purely imaginative; it must be something that produces real discomfort or annoyance, through the medium

what elements shall be considered in estimating legal compensation. Where the loss can be calculated by arithmetical rule and pecuniary standards, the amount of compensation is a question of law. Where the loss cannot be so estimated, as in cases of personal torts, the law merely prescribes what elements of injury shall be considered, and leaves the amount of compensation to the discretion of a jury.

Compensatory damages are either nominal or substantial. Nominal damages are legal compensation for a technical wrong, where no substantial damages are proved. Where damages are thus presumed, they may not strictly be called "compensatory," for they may be awarded though the injury results in a benefit. But they may be strictly coincident with the harm suffered.<sup>6</sup> Accordingly, they sometimes are, and sometimes are not, strictly compensatory.<sup>7</sup> Substantial damages, on the other hand, are measured by the actual loss sustained.<sup>8</sup> Nominal damages were considered in a previous chapter. We will now discuss the principles governing substantial compensation.

of the senses, not from delicacy of taste or a refined fancy." Bird, V. C., in *Westcott v. Middleton*, 43 N. J. Eq. 478, 486, 11 Atl. 490; *Id.*, 44 N. J. Eq. 297, 18 Atl. 80. Damages may be recovered for inconvenience amounting to physical discomfort. *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Southern Kan. Ry. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; *Emery v. City of Lowell*, 109 Mass. 197; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Luse v. Jones*, 39 N. J. Law, 707; *Ives v. Humphreys*, 1 E. D. Smith (N. Y.) 196; *Scott Tp. v. Montgomery*, 95 Pa. 444. See "*Damages*," *Dec. Dig. (Key No.)* §§ 15, 53; *Cent. Dig.* §§ 1, 100.

<sup>6</sup> *Ante*, p. 31.

<sup>7</sup> *Jag. Torts*, 367.

<sup>8</sup> *Chicago, St. L. & P. R. Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1; *Talbott v. West Virginia C. & P. Ry. Co.*, 42 W. Va. 560, 26 S. E. 311. See "*Damages*," *Dec. Dig. (Key No.)* §§ 15, 30; *Cent. Dig.* §§ 1, 222.

**PROXIMATE AND REMOTE CONSEQUENCES IN GENERAL**

19. For purposes of liability, the consequences of wrongful conduct may be divided into
- (a) Proximate consequences, and
  - (b) Remote consequences.
20. Compensation may be recovered only for proximate losses resulting from wrongful conduct, and never for any losses which are remote.

Where compensation is claimed for losses alleged to have been caused by the wrongful conduct of another, the first question is whether the conduct complained of was really the cause of the harm in a sense upon which the law can act. The harm may be traceable to the conduct, but the connection may be, in the accustomed phrase, too remote. "*In jure non remota causa sed proxima spectatur.*" As has been seen, liability must be founded on conduct which is the proximate cause of the harm. Again, there may have been an undoubted wrong, but it may be doubtful how much of the harm is related to the wrongful conduct as its proximate consequence, and therefore is to be counted in estimating the wrongdoer's liability. The harm may be traceable in some measure to the wrongful conduct, but may result chiefly from independent concurrent causes. The distinction of proximate from remote consequences is necessary, not only for the purpose of ascertaining whether there is any liability at all, but also to fix the limit of liability or measure of damages, if a wrong is established for which defendant is liable.<sup>9</sup> "Much the same considerations are involved, whether the attempt is to show that the injury itself is remote from the act or only certain consequences of the injury. These classes of cases are often difficult to distinguish in practice; and both are to some extent involved in the consideration of nominal damages, where they shade into one another. Besides this, a case turning on the

<sup>9</sup> Pol. Torts, 27.

right of action may frequently be a precedent for the decision of a case involving the measure of damages."<sup>10</sup>

It has been said that the term "proximate cause" is not capable of perfect or general definition,<sup>11</sup> and the confusion and uncertainty in the authorities justify the remark. The maxim, "Non remota causa sed proxima causa spectatur," merely points out that some consequences are held too remote to be counted. The test of remoteness is still to be found.<sup>12</sup>

### DIRECT AND CONSEQUENTIAL LOSSES

**21. For the purpose of determining what consequences are proximate and what remote, the losses caused by a wrong may be divided into**

- (a) Direct and
- (b) Consequential losses.

In determining for what losses damages may be recovered, the losses must be considered in their relation to the injury or

<sup>10</sup> Sedg. Dam. 163.

<sup>11</sup> Pol. Torts, 28.

<sup>12</sup> The question as to what is the direct or proximate cause of an injury is ordinarily not one of science or legal knowledge, but of fact, for a jury to determine in view of the accompanying circumstances. *SCHUMAKER v. ST. PAUL & D. R. CO.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257, Cooley, Cas. Damages, 20. The test of the most conspicuous antecedent, suggested by John Stuart Mill, has been recognized. "The cause of an event is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rarely, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily, that condition is usually termed the cause whose share in the matter is most conspicuous, and is the most immediately preceding and proximate in the event." Appleton, C. J., in *Moulton v. Inhabitants of Sanford*, 51 Me. 127, 134. See, also, *Dole v. New England Mut. Marine Ins. Co.*, 2 Cliff. 431, Fed. Cas. No. 3,966; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Northwest Transp. Co. v. Boston Marine Ins. Co.* (C. C.) 41 Fed. 802; *Sutton v. Town of Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534. But see *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568; *Gates v. Burlington, C. R. & M. R. Co.*, 39 Iowa, 45. See "Damages," *Dec. Dig. (Key No.)* §§ 18, 19; *Cent. Dig.* §§ 38-53.



wrong which caused them. The losses may proceed immediately from the wrongful conduct, in which case they are direct. On the other hand, though they are the natural and probable effect of the wrongful conduct, they may proceed therefrom indirectly and through the intervention of some intermediate cause, in which case the losses are consequential.

### **SAME—DIRECT LOSSES**

**22. Direct losses are such losses as proceed immediately from wrongful conduct, without the intervention of any intermediate cause.**

**23. Direct losses are necessarily proximate, and compensation therefor is always recoverable.**

The wrongful conduct which may give rise to a claim for damages may be in the nature of a tort, or may consist in a breach of contract. In either event, all losses which proceed immediately from the wrongful conduct, without the intervention of any intermediate cause, are direct losses.<sup>13</sup>

Direct losses, since they occur without the intervention of an intermediate cause, are necessarily proximate losses,<sup>14</sup> and compensation therefor is always recoverable.

#### *Direct Losses in Torts*

A tortfeasor is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been foreseen by him.<sup>15</sup> The justice and propriety of this rule are

<sup>13</sup> *SCHUMAKER v. ST. PAUL & D. R. CO.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257, Cooley, Cas. Damages, 20. See "Damages," *Dec. Dig. (Key No.)* § 16; *Cent. Dig.* §§ 34-36.

<sup>14</sup> *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535. See "Damages," *Dec. Dig. (Key No.)* §§ 16-19; *Cent. Dig.* §§ 34-53.

<sup>15</sup> *Cogdell v. Yett*, 1 Cold. (Tenn.) 230; *Tally v. Ayres*, 3 Sneed (Tenn.) 677; *Bowas v. Pioneer Tow Line*, 2 Sawy. 21, Fed. Cas. No. 1,713; *Louisville N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep.

manifest. If one man strike another with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual can make no difference. If the wrongdoer should in fact intend but slight injury, and deal a blow which in 99 cases out of 100 would result in a trifling injury, and yet, by accident, produced a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrongdoer from the consequences of his act.

The real question in such cases is, did the wrongful conduct produce the injury complained of? and not whether the party committing the act could have anticipated the result. The fact that the conduct is unlawful renders him liable for all its direct evil consequences.<sup>16</sup> One is conclusively presumed to intend the direct consequences of one's acts. Thus, it was held in a civil action for assault, where defendant had intentionally kicked plaintiff on the leg during school hours, though he did not intend to injure him, that, the act being unlawful, defendant was liable for the injury which in fact resulted, though it could not have been foreseen.<sup>17</sup> So, also, a sleeping car com-

368; *WATSON v. RINDERKNECHT*, 82 Minn. 235, 84 N. W. 798, Cooley, Cas. Damages, 22; *Perley v. Eastern R. Co.*, 98 Mass. 414, 96 Am. Dec. 645; *Lane v. Atlantic Works*, 111 Mass. 136; *Blake v. Lord*, 16 Gray (Mass.) 387; *Sloan v. Edwards*, 61 Md. 89; *Eten v. Luyster*, 60 N. Y. 252; *Lathers v. Wyman*, 76 Wis. 616, 45 N. W. 669; *Newsum v. Newsum*, 1 Leigh (Va.) 86, 19 Am. Dec. 739; *Keenan v. Cavanaugh*, 44 Vt. 268; *Little v. Boston & M. R. R.*, 66 Me. 239; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Lowenstein v. Chappell*, 30 Barb. (N. Y.) 241; *Horner v. Wood*, 16 Barb. (N. Y.) 389; *SCHUMAKER v. ST. PAUL & D. R. CO.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257, Cooley, Cas. Damages, 20; *Bowen v. King*, 146 N. C. 385, 59 S. E. 1044; *Carter v. Wabash R. Co.*, 128 Mo. App. 57, 106 S. W. 611; *Briggs v. Brown*, 55 Fla. 417, 46 South. 325. See "Damages," *Dec. Dig. (Key No.)* §§ 16-24; *Cent. Dig.* §§ 34-68.

<sup>16</sup> *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41. See "Damages," *Dec. Dig. (Key No.)* §§ 16-24; *Cent. Dig.* §§ 34-68.

<sup>17</sup> *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47. See "Damages," *Dec. Dig. (Key No.)* §§ 32-34; *Cent. Dig.* §§ 42, 43.

pany is liable for a miscarriage caused by the wrongful expulsion of a married woman from a berth, though its servants were ignorant of her delicate condition.<sup>18</sup> And generally, where the previous physical condition is such as to increase the loss caused by a personal injury, the wrongdoer, though unaware of such condition, is, nevertheless, liable for the whole loss caused, as such loss is the direct, though unexpected, consequence of the wrong.<sup>19</sup>

<sup>18</sup> *Mann Boudoir-Car Co. v. Dupre*, 4 C. C. A. 540, 54 Fed. 646, 21 L. R. A. 289. *Contra*, *Pullman Palace-Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89—a case much criticised, and opposed to all the other authorities. See, also, *Campbell v. Pullman Palace-Car Co. (C. C.)* 42 Fed. 484; *St. Louis S. W. Ry. Co. of Texas v. Mitchell*, 25 Tex. Civ. App. 197, 60 S. W. 891; *Barbee v. Reese*, 60 Miss. 906; *Oliver v. Town of La Valle*, 36 Wis. 594; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41. See "*Damages*," *Dec. Dig. (Key No.)* §§ 32-34; *Cent. Dig.* §§ 42, 43; "*Carriers*," *Cent. Dig.* § 1486.

<sup>19</sup> *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Lapline v. Morgan's L. & T. R. & S. S. Co.*, 40 La. Ann. 661, 4 South. 875, 1 L. R. A. 378; *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 74; *Baltimore & L. T. Co. v. Cassell*, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Jewell v. Grand Trunk Ry.*, 55 N. H. 84; *Stewart v. City of Ripon*, 38 Wis. 584; *McNamara v. Village of Clintonville*, 63 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722; *Coleman v. New York & N. H. R. Co.*, 106 Mass. 160; *Allison v. Chicago & N. W. R. Co.*, 43 Iowa, 274; *Driess v. Friederick*, 73 Tex. 460, 11 S. W. 493; *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 315; *Tice v. Munn*, 94 N. Y. 621; *Owens v. Kansas City, St. J. & C. B. R. Co.*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; *Louisville & N. R. Co. v. Northington*, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268; *Jackson v. St. Louis, I. M. & S. Ry. Co.*, 87 Mo. 422, 56 Am. Rep. 460; *Louisville, N. A. & C. Ry. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; *Louisville, N. A. & C. Ry. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Wabash, St. L. & P. Ry. Co. v. Locke*, 112 Ind. 474, 14 N. E. 391, 2 Am. St. Rep. 193; *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 Ind. 469, 22 N. E. 340, 6 L. R. A.

*Direct Losses in Breach of Contract*

In actions of contract the rule is the same.<sup>30</sup> Whether the

241, 16 Am. St. Rep. 334; *White Sewing-Mach. Co. v. Richter*, 12 Ind. App. 331, 28 N. E. 446; *Louisville, N. A. & C. Ry. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Wabash R. Co. v. Mathew*, 199 U. S. 605, 26 Sup. Ct. 752, 50 L. Ed. 329, affirming 115 Mo. App. 468, 78 S. W. 271, 81 S. W. 646; *CHICAGO CITY RY. CO. v. SAXBY*, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. Rep. 218, *Cooley, Cas. Damages*, 65; *Spade v. Lynn & B. R. R.*, 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298; *Kral v. Burlington, C. R. & N. Ry. Co.*, 71 Minn. 423, 74 N. W. 166; *Colorado Springs & I. Ry. Co. v. Nichols*, 41 Colo. 272, 92 Pac. 691, 20 L. R. A. (N. S.) 215; *Vandenburgh v. Truax*, 4 Denio (N. Y.) 464, 47 Am. Dec. 268. See, also, cases collected in *Clark v. Chambers*, 3 Q. B. Div. 327, 47 Law J. Q. B. 427; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 63 Fed. 942. "Where a disease caused by the injury supervenes, as well as where the disease exists at the time, and is aggravated by it, the plaintiff is entitled to full compensatory damages." The negligence causing the accident is the proximate cause of the injury. *Louisville, N. A. & C. Ry. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60. See "*Damages*," *Dec. Dig. (Key No.)* §§ 32-34; *Cent. Dig.* §§ 42, 43.

\* *HADLEY v. BAXENDALE*, 9 Exch. 341, *Cooley, Cas. Damages*, 39; *Burrell v. New York & S. S. Salt Co.*, 14 Mich. 34; *Brown v. Foster*, 51 Pa. 165; *Collard v. Southeastern R. Co.*, 7 Hurl. & N. 79; *J. WRAGG & SONS CO. v. MEAD*, 120 Iowa, 319, 94 N. W. 856, *Cooley, Cas. Damages*, 24; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Smith v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 169, 14 N. W. 797; *Rhodes v. Baird*, 16 Ohio St. 581; *Brayton v. Chase*, 3 Wis. 456; *Bridges v. Stickney*, 38 Me. 361; *Paducah Lumber Co. v. Paducah Water-Supply Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536; *Wilson v. Dunville*, 6 L. R. Ir. 210; *Hamilton v. Magill*, 12 L. R. Ir. 186, 202; *Booth v. Spuyten Duyvil Rolling-Mill Co.*, 60 N. Y. 487; *Callup v. Miller*, 25 Hun. (N. Y.) 298; *Louisville, N. A. & C. Ry. Co. v. Sumner*, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; *Louisville, N. A. & C. Ry. Co. v. Power*, 119 Ind. 269, 21 N. E. 751; *Houser v. Pearce*, 13 Kan. 104. See *Prosser v. Jones*, 41 Iowa, 674; *McHose v. Fulmer*, 73 Pa. 365; *Wilkinson v. Davies*, 146 N. Y. 25, 40 N. E. 501; *Indiana, B. & W. Ry. Co. v. Adamson*, 114 Ind. 282, 15 N. E. 5; *Perry Tie & Lumber Co. v. Reynolds*, 100 Va. 264, 40 S. E. 919; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413; *George v. Lane*, 80 Kan. 94, 99, 102 Pac. 55; *New York Market Gardeners' Ass'n v. Adams Dry Goods Co.*, 115 App. Div. 42, 100 N. Y. Supp. 596. See "*Damages*," *Dec. Dig. (Key No.)* §§ 22, 23; *Cent. Dig.* §§ 58-63.

parties to the contract had in mind the damages which might result from a breach does not in the least affect their liability for a loss resulting directly from a breach.<sup>21</sup> The direct consequence of a breach of contract is a loss of the thing contracted for, and is therefore almost necessarily contemplated by the parties. Still, in some cases, the extent of the damage is unexpected, but compensation is recoverable, nevertheless, if the loss is direct. Thus, in an action for breach of a contract of carriage, the carrier is liable for the value of a package lost, though ignorant of the fact that it contained jewels.<sup>22</sup>

### **SAME—CONSEQUENTIAL LOSSES**

**24. Consequential losses are the indirect losses caused by a wrong, but to which some intermediate cause has contributed.**

**25. Consequential losses may be either**

- (a) Proximate, or
- (b) Remote.

**26. PROXIMATE AND REMOTE CONSEQUENTIAL LOSSES—**Consequential losses are proximate when the natural and probable effect of the wrongful conduct under the circumstances is to set in operation the intervening cause from which the loss directly results. When such is not the natural and probable effect of the wrongful conduct, the losses are remote.

<sup>21</sup> Sedg. Dam. 159, 161; Collins v. Stephens, 58 Ala. 543; Daugherty v. American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435; Cohn v. Norton, 57 Conn. 480, 492, 18 Atl. 595, 5 L. R. A. 572. See "Damages," Dec. Dig. (Key No.) §§ 22, 23; Cent. Dig. §§ 58-63.

<sup>22</sup> Kenrig v. Eggleston (1648) Aleyn, 93; Little v. Boston & M. R. R., 66 Me. 239. See, also, Mather v. American Exp. Co., 138 Mass. 55, 52 Am. Rep. 258; France v. Gaudet, L. R. 6 Q. B. 199; Wilson v. Railway Co., 9 C. B. (N. S.) 632; Starbird v. Barrows, 62 N. Y. 615. See "Damages," Dec. Dig. (Key No.) §§ 22, 23; Cent. Dig. §§ 58-63; "Carriers," Dec. Dig. (Key No.) § 110; Cent. Dig. §§ 497-500.

*Consequential Losses in General*

A loss which is the immediate result of wrongful conduct is called a "direct loss."<sup>23</sup> There are, however, other losses that are the indirect results of wrongful conduct, and that are usually designated as "consequential losses." The term "consequential loss" or "consequential damage" has been used in two senses. In some instances it is used as denoting a loss that is so remote as not to be actionable, and in other instances as denoting a loss that, though actionable, does not follow immediately upon the doing of the act complained of.<sup>24</sup> It is in the latter sense that the term is here used. For example, where a fence is destroyed, the loss of the fence is the direct loss. Loss of the crops by reason of trespassing cattle entering at the gap is an indirect or consequential loss. Pain and bruises are the direct results of an assault and battery. The doctor's bill, loss of time, and the like, are consequential losses.<sup>25</sup> The terms "remote damages" and "consequential damages" must not be regarded as necessarily synonymous.<sup>26</sup> The mere fact that the damages are consequential does not preclude recovery, because, in a sense, all damages are consequential. It is only when the conse-

<sup>23</sup> Ante, p. 44.

<sup>24</sup> *Eaton v. Boston, C. & M. R. R. Co.*, 51 N. H. 504, 519, 12 Am. Rep. 147. See "Damages," *Dec. Dig. (Key No.)* §§ 20-23; *Cent. Dig.* §§ 55-64.

<sup>25</sup> *Irby v. Wilde*, 150 Ala. 402, 43 South. 574. See "Damages," *Dec. Dig. (Key No.)* §§ 16-23; *Cent. Dig.* §§ 34-64.

<sup>26</sup> *Eaton v. Boston, C. & M. R. R. Co.*, 51 N. H. 504, 519, 12 Am. Rep. 147. "A damage caused by a breach of a contract is often called consequential (in the technical sense of being a consequence so remote or unexpected as not to entitle the sufferer to redress) where it cannot reasonably be supposed to have been contemplated by the parties, in making the contract, as likely to be caused by the breach; and in tort a damage is often called consequential when it was not a reasonably necessary consequence, or one so natural and probable that the defendant can be reasonably supposed to have foreseen the likelihood of its having been caused by the wrong complained of." *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545. See "Damages," *Dec. Dig. (Key No.)* §§ 16-23; *Cent. Dig.* §§ 34-64.

quential damages are remote, trivial, or uncertain, or result from some justifiable act, that there can be no recovery.<sup>27</sup>

Consequential losses differ from direct losses in this: that some intermediate cause has contributed to the injury. Whether or not compensation can be recovered for such losses will depend on the nature of the intervening cause. The damages recoverable for either a tort or a breach of contract must result without the intervention of any independent cause.<sup>28</sup> In many of the cases the presence or absence of an "independent self-operating cause" is proposed as a test of what is proximate and what remote. But an intervening cause is not regarded as independent when the natural and probable effect of the conduct complained of is to set it in operation.<sup>29</sup> Proximate consequences, therefore, are simply those that are natural and probable.<sup>30</sup> "Natural" and

<sup>27</sup> *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 325. See "Damages," *Dec. Dig. (Key No.)* §§ 6, 18, 24; *Cent. Dig.* §§ 5, 37, 65.

<sup>28</sup> *Sallie v. New York City Ry. Co.*, 110 App. Div. 665, 97 N. Y. Supp. 491; *Brink v. Wabash R. Co.*, 160 Mo. 87, 60 S. W. 1058, 53 L. R. A. 811, 83 Am. St. Rep. 459; *Southern Ry. Co. v. Sittaseu*, 166 Ind. 257, 76 N. E. 973, reversing (Ind. App.) 74 N. E. 898. See "Damages," *Dec. Dig. (Key No.)* §§ 18-23; *Cent. Dig.* §§ 37-62.

<sup>29</sup> *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909. See "Damages," *Dec. Dig. (Key No.)* §§ 16-23; *Cent. Dig.* §§ 34-67; "Negligence," *Dec. Dig. (Key No.)* §§ 56-62; *Cent. Dig.* §§ 34-67.

<sup>30</sup> *Southern Ry. Co. v. Sittaseu*, 166 Ind. 257, 76 N. E. 973; *Enlaw v. Hawkins*, 71 Kan. 633, 81 Pac. 189. Whether or not a given result is natural and probable is for the jury. *Haverly v. State Line & S. R. Co.*, 135 Pa. 50, 19 Atl. 1013, 20 Am. St. Rep. 848. See, also, *Milwaukee & So. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. "Ordinarily, in cases of contract, the question is not one of liability for proximate cause, but of consequential damages. The breach of contract establishes liability, and the question of the allowance of any item of damage is practically one of the interpretations of the contract, and consequently for the court." *Sedg. El. Dam.* 64, citing *Hobbs v. Railroad Co.*, L. R. 10 Q. B. 111, 122; *Hammond v. Bussey*, 20 Q. B. Div. 79, 89. In an action of contract, *Blackburn, J.*, said: "I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there

"probable" means what, according to common experience and the usual course of events, should be expected to happen.<sup>31</sup> Every one is conclusively presumed to know and contemplate the natural and probable result of his acts.<sup>32</sup> The rule of natural and probable consequences is a vague one; but, as Sir Frederick Pollock has said,<sup>33</sup> if English law seems vague on these questions, it is because it is grappled more closely with the inherent vagueness of facts than any other system. In whatever form the rule is stated, it must be remembered that it is not a logical definition, but only a guide to the exercise of common sense. "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." The practical application of any rule is a matter of great difficulty. Different courts, though equally acknowledging the same principles, have sometimes reached diverse conclusions on similar states of facts. When the best possible rule is stated, each case must still be decided upon its own special state of facts, and often upon the nicest discriminations. "While in many cases the rule of damages is plain and easy of application, there are many others in which, from the nature of the subject-matter and the peculiar circumstances, it is very difficult, and in some cases impossible, to lay down any definite, fixed rule of law by which the damages actually sustained can be estimated with a reasonable degree of accuracy, or even a probable approximation to justice; and the injury must be left wholly or in great part unredressed or the question must be left to the good sense of the jury upon all the facts and circumstances of the case, aided by such advice and in-

shall be no such rule as to damages being too remote." *Hobbs v. London & S. W. R. Co.*, L. R. 10 Q. B. 111. See "Damages," *Dec. Dig. (Key No.)* §§ 18, 19; *Cent. Dig.* §§ 37-53.

<sup>31</sup> *Brown Store Co. v. Chattahoochee Lumber Co.*, 121 Ga. 809, 49 S. E. 839; *Western Ry. of Alabama v. Mutch*, 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179; *Georgia v. Keppelford*, 45 Iowa, 48. See "Damages," *Dec. Dig. (Key No.)* §§ 20-23; *Cent. Dig.* §§ 55-67.

<sup>32</sup> *Suth. Dam.* 32.

<sup>33</sup> *Pol. Torts*, 33.



structions from the court as the peculiar facts and circumstances of the case may seem to require. But the strong inclination of the courts to administer legal redress upon fixed and certain rules has sometimes led to the adoption of such rules in cases to which they could not be consistently or justly applied. Hence there is, perhaps, no branch of the law upon which there is a greater conflict of judicial decisions, and none in which so many merely arbitrary rules have been adopted. We are compelled to say that the line of mere authority upon questions of damages like that here presented, if any such line can be traced through the conflict of hostile decisions, is too confused and tortuous to guide us to a safe or satisfactory result, without resort to the principles of natural justice and sound policy which underlie these questions, and which have sometimes been overlooked or obscured by artificial distinctions and arbitrary rules."<sup>84</sup>

The difficulty in stating and applying any practical rule has been much increased by the failure of courts to always use terms with precision and consistency. The distinction between proximate and remote consequences is often confounded with considerations of certainty and uncertainty of loss. Compensation for remote losses is refused, not because the loss is not in one sense caused by the wrong, but for reasons of public policy, and because the chain of causation cannot be followed with sufficient certainty.<sup>85</sup> No cause can operate without being influenced by other causes. So, also, no cause is without an effect, which, in turn, becomes the cause of a further effect, and so on to infinity.

It is just here that the difficulty lies. No effect is the product of a single isolated cause, but rather of innumerable antecedent or coexisting causes. In one sense, every cause is the sum of all the antecedents, for no particular event could have happened if any one of innumerable necessary conditions

<sup>84</sup> *Allison v. Chandler*, 11 Mich. 542. See "*Damages*," *Dec. Dig. (Key No.)* §§ 20-23; *Cent. Dig.* §§ 55-67; "*Negligence*," *Dec. Dig. (Key No.)* §§ 56-62; *Cent. Dig.* §§ 69-79.

<sup>85</sup> *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. See "*Damages*," *Dec. Dig. (Key No.)* §§ 18, 19; *Cent. Dig.* §§ 37-53.

had been absent. Mr. Wharton<sup>86</sup> states the case of a haystack fired by a spark from a passing engine. If the railroad had not been built, an event depending on an almost infinite number of conditions (among them, the discovery of coal and iron), or if the haystack had not been erected, an event also dependent on innumerable conditions, no fire would have occurred. Each one of such conditions may therefore be regarded as a cause of the injury, for without it the fire could not have happened. In this view, every antecedent event is a cause of every subsequent one.

It is obvious that the law cannot concern itself with such metaphysical refinements. Liability for consequences must end somewhere, and the law has fixed this limit at the natural and probable consequences. Compensation is recoverable for consequential losses only when they are proximate. Consequential losses are proximate only when they are natural and probable.<sup>87</sup> Consequences are natural and probable only when, according to common experience and the usual course of events, the effect of the wrongful conduct was to set in operation the intermediate cause;<sup>88</sup> that is to say, when the intermediate cause was not independent.

When an efficient adequate cause of an injury is found, it must be taken as the true cause, unless some other independent cause is shown to have intervened between it and the injury.<sup>89</sup> The inquiry is always whether there was any in-

<sup>86</sup> Whart. Neg. § 85.

<sup>87</sup> *Enlow v. Hawkins*, 71 Kan. 633, 81 Pac. 189; *W. F. Vandiver & Co. v. Waller*, 143 Ala. 411, 39 South. 136; *O'Donnell v. Rhode Island Co.*, 28 R. I. 245, 66 Atl. 578; *Wells v. Boston & M. R. R.* 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987. See "*Damages*," *Dec. Dig. (Key No.)* §§ 16-24; *Cent. Dig.* §§ 34-70; "*Negligence*," *Dec. Dig. (Key No.)* §§ 56-62; *Cent. Dig.* §§ 69-79.

<sup>88</sup> *GILSON v. DELAWARE & H. CANAL CO.*, 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep. 802; *Cooley, Cas. Damages*, 27; *Gilman v. Noyes*, 57 N. H. 627; *Griggs v. Fleckenstein*, 14 Minn. 81 (Gil. 62), 100 Am. Dec. 199; *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768. See "*Damages*," *Dec. Dig. (Key No.)* §§ 16-24; *Cent. Dig.* §§ 34-70; "*Negligence*," *Dec. Dig. (Key No.)* §§ 56-62; *Cent. Dig.* §§ 69-79.

<sup>89</sup> *Chamberlain v. City of Oshkosh*, 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928; *Milwaukee & St. P. R. Co.*

intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury.<sup>40</sup> If there was, then such intermediate cause must be regarded as the proximate cause, and all antecedent causes as remote.<sup>41</sup>

The nature of the intervening cause is the all-important and decisive question. If it is independent of defendant's fault, and such that without it the injury would not have happened, the loss is remote, though defendant's act con-

v. Kellogg, 94 U. S. 469, 24 L. Ed. 256, where it is said: "In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time." See, also, *Sallie v. New York City R. Co.*, 110 App. Div. 665, 97 N. Y. Supp. 491; *WOOD v. PENNSYLVANIA R. CO.*, 177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199, 55 Am. St. Rep. 723, Cooley, Cas. Damages, 32; *Bahr v. Mauke*, 77 Neb. 552, 110 N. W. 300 (breach of contract); *Kellogg v. Chicago & N. W. Ry. Co.*, 28 Wis. 223, 7 Am. Rep. 69; *Georgetown, B. & L. Ry. Co. v. Eagles*, 9 Colo. 545, 13 Pac. 696; *Blythe v. Denver & R. G. R. Co.*, 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403. See "Damages," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 38-53; "Negligence," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 76-79.

\* *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768. If the injury received by the plaintiff through the negligence of the defendant superinduced and contributed to the production or development of a cancer, the defendant is responsible therefor, and the cancer is not to be treated as an independent cause of injury or suffering. The wrongdoer cannot be allowed to apportion the measure of his responsibility to the initial cause. *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134. See "Damages," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 38-53; "Negligence," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 76-79.

\* *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Gilman v. Noyes*, 57 N. H. 627; *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Hoey v. Felton*, 11 C. B. (N. S.) 142. See "Damages," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 38-53; "Negligence," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 76-79.

tributed to it.<sup>42</sup> So, too, when there are several concurrent causes contributing to the loss, and each is an efficient cause,

\* **WOOD v. PENNSYLVANIA R. CO.**, 177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199, 55 Am. St. Rep. 728, Cooley, Cas. Damages, 32; **Central of Georgia R. Co. v. Dorsey**, 116 Ga. 719, 42 S. E. 1024. Where plaintiff was induced by false representations to put money in a speculation, and afterwards put in more money, the loss of the latter money was held a proximate consequence of the fraud. **Crater v. Binninger**, 33 N. J. Law, 513, 97 Am. Dec. 737. Injury to plaintiff's mill and machinery, caused by a boiler explosion, is a proximate consequence of defects in the boiler. **Page v. Ford**, 12 Ind. 46; **Erie City Iron Works v. Barber**, 106 Pa. 125, 51 Am. Rep. 508. Where defendant abducted plaintiff's slaves, leaving no one to care for the plantation, it was held that compensation could be recovered for corn destroyed by cattle of the neighbors, and for wood swept away by a flood. **McAfee v. Crofford**, 13 How. 447, 14 L. Ed. 217. Plaintiff's inability to get farm hands was due to their fear of contracting smallpox, and the location of a pest house near his farm was not the proximate cause of the injury. **McKay v. City of Henderson (Ky.)** 71 S. W. 625. A loss through deprivation of means of protection is proximate. **Derry v. Flitner**, 118 Mass. 131; **The George and Richard**, L. R. 3 Adm. & Ecc. 466; **Wilson v. Newport Dock Co.**, L. R. 1 Exch. 177. **Borradaile v. Brunton**, 8 Taunt. 535; 2 Moore, 582. A defect in a fence is a proximate cause of a trespass by cattle and injury to crops. **Scott v. Kenton**, 81 Ill. 96. It is natural and probable that a trespassing horse will kick other horses on the premises. **Lee v. Riley**, 34 Law J. C. P. 212; **Lyons v. Merrick**, 105 Mass. 71. Where plaintiff's horses escaped through the defect, and were killed by the falling of a haystack on defendant's premises, the loss was held not too remote. **Powell v. Salisbury**, 2 Younge & J. 391. Where cattle escaped, and ate branches of a yew tree, and were thereby poisoned, the loss is the proximate result of the defect. **Lawrence v. Jenkins**, L. R. 8 Q. B. 274. Where defendant's wrong obliges plaintiff to raise money, a loss through a forced sale of property is too remote to be compensated. See **Deyo v. Waggoner**, 19 Johns. (N. Y.) 241; **Donnell v. Jones**, 13 Ala. 490, 48 Am. Dec. 59; **Cochrane v. Quackenbush**, 29 Minn. 376, 13 N. W. 154; **Larios v. Gurety**, L. R. 5 P. C. 346; **Travis v. Duffau**, 20 Tex. 49; **Smith v. O'Donnell**, 8 Lea. (Tenn.) 468. Where injured person abandoned contract to get out timber injury was not proximate cause of loss of profits. **Wells v. Boston & M. R. R.**, 82 Vt. 108, 71 Atl. 1103, 137 Am. St. Rep. 987. Selling animals with an infectious disease is the proximate cause of its communication to other animals of the purchaser. **Wheeler v. Randall**, 48 Ill. 182; **Sherrod v. Langdon**, 21 Iowa, 518; **Joy v.**

the loss may be attributed to any or all of the causes, but it cannot be attributed to the alleged wrongful act, unless with-

Bitzer, 77 Iowa, 73, 41 N. W. 575, 3 L. R. A. 184; Broquet v. Tripp, 36 Kan. 700, 14 Pac. 227; Faris v. Lewis, 2 B. Mon. (Ky) 375; Bradley v. Rea, 14 Allen (Mass.) 20; Long v. Clapp, 15 Neb. 417, 19 N. W. 467; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; Wintz v. Morrison, 17 Tex. 372, 67 Am. Dec. 658; Routh v. Caron, 64 Tex. 289; Packard v. Slack, 32 Vt. 9; Smith v. Green, 1 C. P. Div. 92. Loss of business caused by the deprivation of machinery or of business premises is usually considered proximate. Waters v. Towers, 8 Exch. 401; New York & C. Mining Syndicate & Co. v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031; Jolly v. Single, 16 Wis. 280; Savannah, F. & W. Ry. Co. v. Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92; Van Winkle v. Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299; Sitton v. MacDonald, 25 S. C. 68, 60 Am. Rep. 484; New Haven Steam-Boat Co. v. City of New York, 36 Fed. 716; Moore v. Davis, 49 N. H. 45, 6 Am. Rep. 460; Carlisle v. Callahan, 78 Ga. 320, 2 S. E. 751; Lange v. Wagner, 52 Md. 310, 36 Am. Rep. 380. But see Vedder v. Hildreth, 2 Wis. 427, and Ruthven Woolen Mfg. Co. v. Great Western R. Co., 18 U. C. C. P. 316. Loss of goods by sudden flood is not a proximate consequence of a negligent delay by a carrier. Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909. But see contra, Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co., 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882. See post, note 101. Where a defect in the street causes a traveler to be thrown out of his carriage, and exposed to the cold and rain, the city is liable for a serious disease thereby contracted. Ehrgott v. Mayor, etc., of City of New York, 96 N. Y. 264, 48 Am. Rep. 622. See, also, Sallie v. New York City R. Co., 110 App. Div. 665, 97 N. Y. Supp. 491. In an action on a fire insurance policy, the judge, in his charge to the jury, stated the theory of plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection was made between them, called a 'short circuit;' that the short circuit resulted in keeping back, or in bringing into the dynamo below, an increase of electric current, that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed, and the succeeding pulleys, up to the jack pulley, were ruptured; that

out its operation the loss would not have occurred.<sup>43</sup> If the concurrent cause is sufficient, the other cause will be regarded as remote, unless there is proof that it alone caused the loss.<sup>44</sup> In all cases, it is, of course, prerequisite to any liability that defendant's act had an influence in causing the injury.<sup>45</sup> There must be an immediate and natural relation

by reason of pieces flying from the jack pulley, or from some other cause, the fly wheel of the engine was destroyed, the governor broken, and everything crushed,—in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt, through the action of electricity, and that caused the damage." It was held that the loss was a natural and proximate consequence of the fire, and recoverable. *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540. See "*Damages*," *Dec. Dig. (Key No.)* §§ 15-24; *Cent. Dig.* §§ 34-64; "*Negligence*," *Dec. Dig. (Key No.)* §§ 56-62; *Cent. Dig.* §§ 69-79; "*Torts*," *Dec. Dig. (Key No.)* § 15; *Cent. Dig.* §§ 19-22.

\* *Ring v. City of Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574. See "*Negligence*," *Dec. Dig. (Key No.)* § 61; *Cent. Dig.* §§ 74, 75.

\* *Sullivan County v. Ruth*, 106 Tenn. 85, 59 S. W. 138. See, also, *Central of Georgia R. Co. v. Dorsey*, 116 Ga. 719, 42 S. E. 1024; *Rooney v. New York, N. H. & H. R. Co.*, 173 Mass. 222, 53 N. E. 435; *Vicars v. Wilcocks*, 8 East. 1. See "*Negligence*," *Dec. Dig. (Key No.)* § 61; *Cent. Dig.* § 74, 75.

\* *Royston v. Illinois Cent. R. Co.*, 67 Miss. 376, 7 South. 320; *Ring v. City of Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Jackson v. Hall*, 84 N. C. 489; *Wulstein v. Mohlman* (Super. N. Y.) 5 N. Y. Supp. 569; *Ellis v. Cleveland*, 55 Vt. 358; *Huxley v. Berg*, 1 Starkie, 98; *Hampton v. Jones*, 58 Iowa, 317, 12 N. W. 276; *Swinfin v. Lowry*, 37 Minn. 345, 34 N. W. 22; *Lewis v. Flint & P. M. Ry. Co.*, 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790 (cause and occasion. Opinion by Cooley, J., collecting and discussing cases). Where a 10 year old boy, while attempting to climb up a ladder attached to a box car of a moving train, lost his footing, and was thrown under the train and killed, his own negligence was the proximate cause of his death. There was no causal connection between the negligence of the company in running its train at a greater speed than allowed by ordinance, and the injury suffered. *Western Ry. of Alabama v. Mutch*, 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179. Money paid by a railroad company as damages and expenses of a suit brought against it for ejecting a passenger who refused to pay fare, except by presenting a coupon issued by a connecting line without authority, cannot be recovered from the latter; for the only remedy, as

between the act complained of and the injury, without the intervention of other independent causes, or the damages will be too remote.<sup>46</sup>

*Illustrations of Proximate and Remote Consequences*

Where defendant destroyed the lateral support of a house by wrongfully excavating in a public street, he is liable for injuries to an adjoining house depending on the other for support,<sup>47</sup> no independent cause having intervened. A gas company contracted to supply plaintiff with a service pipe, and laid a defective pipe, from which gas escaped. A plumber employed by plaintiff took a lighted candle to discover from whence the gas escaped, and an explosion took place. The negligence of the gas company in laying a defective pipe was held the proximate cause of the explosion.<sup>48</sup> Here the injury could not have happened but for the intervening negligence of the plumber, but the obvious tendency of the original fault was to set in operation just such a force, and therefore the loss could not be regarded as remote. Where a village maintains a sidewalk at an unsafe height without guards it is liable for injuries to one who is negligently pushed off by a third

against it, was to refuse to recognize the coupon, and the subsequent ejection, particularly if accompanied by unnecessary force, was not made legally necessary by its act in selling the ticket, but was upon the sole responsibility of the company causing the same. *Pennsylvania R. Co. v. Wabash, St. L. & P. R. Co.*, 157 U. S. 225, 15 Sup. Ct. 576, 39 L. Ed. 682. See "*Damages*," *Dec. Dig. (Key No.)* §§ 17-24; *Cent. Dig.* §§ 34-67.

"*Rucker v. Athens Mfg. Co.*, 54 Ga. 84; *Ring v. City of Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Western Ry. of Alabama v. Mutch*, 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179; *Georgia v. Kepford*, 45 Iowa, 48. See "*Damages*," *Dec. Dig. (Key No.)* §§ 16-23; *Cent. Dig.* §§ 34-62; "*Negligence*," *Dec. Dig. (Key No.)* §§ 56-62; *Cent. Dig.* §§ 69-79.

"*Baltimore & P. R. Co. v. Reaney*, 42 Md. 118. See "*Adjoining Landowners*," *Dec. Dig. (Key No.)* § 6; *Cent. Dig.* § 51.

"*Burrows v. March Gas & Coke Co.*, 39 Law J. Exch. 32 L. R. 5 Exch. 67. See, also, *Lannen v. Albany Gaslight Co.*, 44 N. Y. 459; *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432. See "*Negligence*," *Dec. Dig. (Key No.)* §§ 56-62; *Cent. Dig.* §§ 69-79.

person;<sup>49</sup> but, where a town negligently leaves an excavation in a street, it is not liable to one who was willfully thrown into it by another.<sup>50</sup> The act of the latter was not a natural and probable effect of the act of the town. There was no causal connection between them. In *Sharp v. Powell*,<sup>51</sup> the defendant, contrary to a police regulation, had washed his wagon in the public street, allowing the water to run down the gutter, to a sewer which, under ordinary circumstances, would have carried it off. But the grating over the sewer was obstructed, and the water spread over the pavement, and froze, forming a sheet of ice. Plaintiff's horse, being led by, slipped on the ice, and broke its leg. Defendant did not know that the grating was obstructed. It was held that defendant was not liable, the court saying that the loss was too remote, because not one which defendant could fairly be expected to anticipate as likely to ensue from his act. The formation of the sheet of ice at the sewer was not a natural and probable result of defendant's wrong. The obstruction of the grating was an unusual circumstance.

The shooting of plaintiff's decedent while making an attack on a neighbor's house when drunk is not a natural and probable consequence of the liquor dealer's unlawful conduct in selling to him while intoxicated,<sup>52</sup> for independent causes intervened. Where an injury to a traveler on a highway is caused partly by a defective road and partly by ice with which it is covered, the defect in the road is the proximate cause of

<sup>49</sup> *Village of Cartersville v. Cooke*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248. See "*Municipal Corporations*," *Dec. Dig. (Key No.)* § 800; *Cent. Dig.* § 1670.

<sup>50</sup> *Alexander v. Town of New Castle*, 115 Ind. 51, 17 N. E. 200. See "*Municipal Corporations*," *Dec. Dig. (Key No.)* § 800; *Cent. Dig.* § 1670.

<sup>51</sup> L. R. 7 C. P. 253, 41 Law J. C. P. 95. Cf. *Chamberlain v. City of Oshkosh*, 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928. But see *McCloskey v. Moies*, 19 R. I. 297, 33 Atl. 225; *Adams v. Chicopee*, 147 Mass. 440, 18 N. E. 231. See "*Municipal Corporations*," *Dec. Dig. (Key No.)* § 772; *Cent. Dig.* § 1628.

<sup>52</sup> *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446. And see *Bradford v. Boley*, 167 Pa. 506, 31 Atl. 751. See "*Intoxicating Liquors*," *Dec. Dig. (Key No.)* § 291; *Cent. Dig.* §§ 425-427.



the injury.<sup>53</sup> The duty of the city is not affected by the fact that the ice is in part the result of artificial causes, as of water escaping from a hose, and not wholly of natural causes, such as the fall of rain.<sup>54</sup>

Malarial fever, resulting from being bitten by mosquitoes bred in unusual numbers in stagnant water caused by a dam, is not too remote to support a recovery, though the mosquitoes would have been incapable of communicating the disease unless they had first bitten some other persons already infected with malaria.<sup>55</sup>

Where plaintiff could have avoided the injurious consequences of defendant's wrong, his negligence in failing to do so is regarded as the proximate cause of the damage, and the original fault is remote.<sup>56</sup> A carrier set plaintiff down a mile from her destination. The day was cold, and there was a line of street cars which plaintiff might have used, but she walked home, and, in so doing, caught cold, and suffered permanent injuries. The injury was held too remote, plaintiff's negligence in failing to take the street car having intervened and caused the injury.<sup>57</sup> On the other hand, where one who had

<sup>53</sup> *City of Atchison v. King*, 9 Kan. 550; *City of Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41. See "*Municipal Corporations*," *Dec. Dig. (Key No.)* § 800; *Cent. Dig.* §§ 1666-1671.

<sup>54</sup> *Henkes v. City of Minneapolis*, 42 Minn. 530, 44 N. W. 1026. As to highway accidents generally, see *Oliver v. Town of La Valle*, 36 Wis. 592; *Jackson v. Town of Bellevue*, 30 Wis. 250; *Kelley v. Town of Fond du Lac*, 31 Wis. 179; *Moulton v. Inhabitants of Sanford*, 51 Me. 127; *Cobb v. Inhabitants of Standish*, 14 Me. 198; *Marble v. City of Worcester*, 4 Gray (Mass.) 395; *Palmer v. Inhabitants of Andover*, 2 Cush. (Mass.) 600; *Davis v. Inhabitants of Dudley*, 4 Allen (Mass.) 557; *Smith v. Smith*, 2 Pick. (Mass.) 621, 13 Am. Dec. 464; *Horton v. City of Taunton*, 97 Mass. 266, note; *Hyatt v. Trustees of Village of Rondout*, 44 Barb. (N. Y.) 385; *Sykes v. Pawlet*, 43 Vt. 446, 5 Am. Rep. 295; *Bovee v. Danville*, 53 Vt. 183. See "*Municipal Corporations*," *Dec. Dig. (Key No.)* §§ 770-772; *Cent. Dig.* §§ 1627, 1628.

<sup>55</sup> *TOWALIGA FALLS POWER CO. v. SIMS*, 6 Ga. App. 749, 65 S. E. 844, *Cooley, Cas. Damages*, 30. See "*Damages*," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 38-53.

<sup>56</sup> See post, "Avoidable Consequences."

<sup>57</sup> *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7. See, also, *Hobbs v. Railroad Co.*, L. R. 10 Q. B. 111; *Indianapolis, B. & W.*

been injured was out on crutches under his physician's instructions, and, while exercising reasonable care, fell and suffered additional injury, he may recover all his damages from the one who caused the original injury, if the second injury would not have occurred except for the first.<sup>58</sup>

Where a human agency or the voluntary act of a person over whom defendant has no control intervenes after defendant's wrongful act, the consequences are usually remote.<sup>59</sup> But, where the act of the third party is a natural and probable result of defendant's acts, the loss is not too remote.<sup>60</sup> Loss of credit or custom involves the intervention of the will of strangers, and is therefore usually too remote.<sup>61</sup> But, where the wrongful conduct directly affects the credit or trade of plaintiff, the rule is otherwise.<sup>62</sup> A trespasser is liable for the

R. Co. v. Birney, 71 Ill. 391. But see Drake v. Kiely, 93 Pa. 492. See "Carriers," *Dec. Dig. (Key No.)* § 277; *Cent. Dig.* §§ 1082-1084.

<sup>58</sup> Hoseth v. Preston Mill Co., 49 Wash. 682, 96 Pac. 423. See "Damages," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 38-53.

<sup>59</sup> Burton v. Pinkerton, L. R. 2 Exch. 340; Stone v. Codman, 15 Pick. (Mass.) 297; Schmidt v. Mitchell, 84 Ill. 195, 25 Am. Rep. 446; Hampton v. Jones, 58 Iowa, 317, 12 N. W. 276; Ellis v. Cleveland, 55 Vt. 358; Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; State v. Ward, 9 Heisk. (Tenn.) 100, 133; Vicars v. Wilcocks, 8 East. 1, 2 Smith, Lead. Cas. Eq. 553, and exhaustive note. Loss of a situation is not a proximate consequence of an assault and battery. Brown v. Cummings, 7 Allen (Mass.) 507. See "Damages," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 38-53; "Negligence," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 76-79; "Railroads," *Cent. Dig.* § 1662.

<sup>60</sup> Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62), 100 Am. Dec. 199; Billman v. Indianapolis C. & L. R. Co., 76 Ind. 166, 40 Am. Rep. 230; McDonald v. Snelling, 14 Allen (Mass.) 292, 92 Am. Dec. 768; 2 Greenl. Ev. §§ 256, 286, 286a; 3 Pars. Cont. 179, 180; Pig. Torts, 169. See "Damages," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 38-53.

<sup>61</sup> Lowenstein v. Monroe, 55 Iowa, 82, 7 N. W. 406; Weeks v. Prescott, 53 Vt. 57; Burnap v. Wight, 14 Ill. 301. See Alexander v. Jacoby, 23 Ohio St. 358; Dennis v. Stoughton, 55 Vt. 371; Pollock v. Gantt, 69 Ala. 373, 44 Am. Rep. 519. Contra, MacVeagh v. Bailey, 29 Ill. App. 606. See "Attachment," *Dec. Dig. (Key No.)* § 375; *Cent. Dig.* §§ 1385, 1390; "Libel and Slander," *Cent. Dig.* § 343.

<sup>62</sup> Boyd v. Fitt, 14 Ir. C. L. 43; Larios v. Gurety, L. R. 5 P. C. 346; Tarleton v. M'Gawley, Peake, N. P. 270. See "Attachment," *Dec. Dig. (Key No.)* § 375; *Cent. Dig.* §§ 1385, 1390; "Libel and Slander," *Cent. Dig.* § 343.

injury caused by a crowd which he draws after him, if his act was of a nature to attract a destructive crowd.<sup>63</sup>

The conflicting views of the courts as to the nature of the loss as proximate or remote is well illustrated by a line of cases involving the question whether a carrier, who by a negligent delay in transporting goods has subjected them, in the course of transportation, to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay, is liable for the loss. In several well considered cases decided while the question was new, it was held that the negligent delay in transportation could not be regarded as the proximate cause of the loss which occurred by reason of a casualty which in itself constituted an act of God, as that term is used in defining the carrier's exemption from liability, though, had the goods been transported with reasonable diligence, they would not have been subjected to such casualty. In *Denny v. New York Cent. R. Co.*,<sup>64</sup> by reason of the delay in transportation the goods were overtaken by an unprecedented flood and damaged, and it was held that the flood and not the delay of the carrier was the proximate cause of loss. A similar conclusion has been arrived at in several other cases in which the facts were similar to those in the *Denny Case*.<sup>65</sup> On the other hand, it was held by the court of appeals of New York, in a case arising out of the same flood which caused the loss of the goods in the *Denny Case*, that the negligent delay on the part of the carrier in consequence of

<sup>63</sup> *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664; *Guille v. Swan*, 19 Johns. (N. Y.) 881, 10 Am. Dec. 234. See "*Trespass*," *Dec. Dig. (Key No.)* §§ 47-50; *Cent. Dig.* §§ 128-136.

<sup>64</sup> 13 Gray (Mass.) 481, 74 Am. Dec. 645. See "*Carriers*," *Dec. Dig. (Key No.)* § 123; *Cent. Dig.* §§ 540, 541.

<sup>65</sup> *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Daniels v. Ballantine*, 23 Ohio St 532, 13 Am. Rep. 264 (storm); *Hunt v. Missouri K. & T. R. Co.* (Tex. Civ. App.) 74 S. W. 69 (storm). See, also, *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106 (fire); *Yazoo & M. V. R. Co. v. Millsaps*, 76 Miss. 855, 25 South. 672, 71 Am. St. Rep. 543. See "*Carriers*," *Dec. Dig. (Key No.)* § 123; *Cent. Dig.* §§ 540, 541.

which the goods were exposed to the flood must be regarded as the proximate cause of the loss.<sup>66</sup> A similar view has been taken by other courts where the loss was due to a flood,<sup>67</sup> and by the New York court when the loss was by fire.<sup>68</sup>

### **SAME—COMPENSATION FOR CONSEQUENTIAL LOSSES**

#### **27. Compensation can be recovered for consequential losses only when they are the natural and probable result of the wrongful conduct.**

It is the general and well-established rule that consequential losses, in order to support a claim for damages, must be the natural and probable result of the wrongful conduct. Natural consequences are those which follow an act in the usual order of events, and which, therefore, might reasonably have been anticipated under the circumstances.<sup>69</sup> Whether the action is for a tort or a breach of contract, the loss must be the proximate result of the primary fault, or compensation cannot be recovered.<sup>70</sup> In determining whether the loss suffered is a proximate consequence, the test in both classes of cases is the same—the natural and probable tendency of the wrongful conduct to produce the loss in question.<sup>71</sup> But, in determining

<sup>66</sup> *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426. See "*Carriers*," *Dec. Dig. (Key No.)* § 123; *Cent. Dig.* §§ 540, 541.

<sup>67</sup> *Wald v. Pittsburgh, C., C. & St. L. R. Co.*, 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332 (Johnstown flood); *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co.*, 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882. See "*Carriers*," *Dec. Dig. (Key No.)* § 123; *Cent. Dig.* §§ 540, 541.

<sup>68</sup> *Condit v. Grand Trunk R. Co.*, 54 N. Y. 500. See "*Carriers*," *Dec. Dig. (Key No.)* § 123; *Cent. Dig.* §§ 540, 541.

<sup>69</sup> Ante, p. 42.

<sup>70</sup> Ante, pp. 42, 48.

<sup>71</sup> *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; *Carter v. Wabash R. Co.*, 128 Mo. App. 57, 106 S. W. 611; *Bahr v. Mauke*, 77 Neb. 552, 110 N. W. 300. See "*Damages*," *Dec. Dig. (Key No.)* §§ 20-23; *Cent. Dig.* §§ 55-62.

what consequential losses shall be compensated, there is an important distinction between cases of contract and cases of tort.<sup>72</sup> Liability for consequences is much more extended in the case of torts than of contracts. Compensation may be recovered for all the injurious consequences of a tort which result according to the usual order of events and general experience, and which, therefore, at the time the tort was committed, the wrongdoer may reasonably be presumed to have anticipated.<sup>73</sup> It is not necessary that they should be the usual, direct or necessary result.<sup>74</sup> But, for breach of contract, compensation may be recovered only for such consequential losses as are natural and probable under the circumstances contemplated by the parties at the time the contract was made;<sup>75</sup> and it is wholly immaterial what consequences are natural and probable, or even actually contemplated at the time of the breach.<sup>76</sup> "For proximate and natural con-

<sup>72</sup> *Suth. Dam.* § 45.

<sup>73</sup> *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; *Briggs v. Brown*, 55 Fla. 417, 46 South. 325; *Flori v. City of St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Bowen v. King*, 146 N. C. 385, 59 S. E. 1044; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Forney v. Geldmacher*, 75 Mo. 113, 42 Am. Rep. 388; *Hughes v. McDonough*, 43 N. J. Law, 459; *Wiley v. West Jersey R. Co.*, 44 N. J. Law, 247; *Warwick v. Hutchinson*, 45 N. J. Law, 61; *Chalk v. Charlotte C. & A. R. Co.*, 85 N. C. 423; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Jackson v. Nashville C. & St. L. R. Co.*, 13 Lea (Tenn.) 491, 49 Am. Rep. 663; *Borchardt v. Wassau Boom Co.*, 54 Wis. 107, 11 N. W. 440, 41 Am. Rep. 12. See "*Damages*," *Dec. Dig. (Key No.)* § 20; *Cent. Dig.* §§ 55-57.

<sup>74</sup> *Brown Store Co. v. Chattahoochee Lumber Co.*, 121 Ga. 809, 49 S. E. 839. See "*Damages*," *Dec. Dig. (Key No.)* § 20; *Cent. Dig.* §§ 55-57.

<sup>75</sup> *Atchison, T. & S. F. Ry. Co. v. Thomas*, 70 Kan. 409, 78 Pac. 861; *HEDDEN v. SCHNEBLIN*, 126 Mo. App. 478, 104 S. W. 887, *Cooley, Cas. Damages*, 45; *Duggleby Bros. v. Lewis Roofing Co.*, 139 Iowa, 432, 116 N. W. 711; *George v. Lane*, 80 Kan. 94, 99, 102 Pac. 55. See "*Damages*," *Dec. Dig. (Key No.)* §§ 22, 23; *Cent. Dig.* §§ 58-62.

<sup>76</sup> *Suth. Dam.* § 45; *HADLEY v. BAXENDALE*, 9 Exch. 341, *Cooley, Cas. Damages*, 39; *Candee v. Western Union Tel. Co.*, 34

sequences of the defendant's act, whether it be a breach of contract or a tort, a recovery can always be had. The only meaning of the rule with regard to the contemplation of parties is that in contract a particular species of proof as to special consequences is often available, which is not so in tort." 77

**28. CONSEQUENTIAL DAMAGES FOR TORTS—Compensation may be recovered for the consequential losses resulting from a tort which were natural and probable at the time the tort was committed.**

Where, at the time a tort was committed, it might have been reasonably expected to set in operation the intermediate cause of an injury, or where it exposes plaintiff to the risk of injury from some fairly obvious danger, which ultimately results in injury, the loss is a natural and probable one, and may be compensated.<sup>78</sup> The rule that compensation for consequential injuries caused by torts cannot be recovered unless they are such as could have been reasonably anticipated does not require the injury to have been actually foreseen.<sup>79</sup> It

Wis. 479, 17 Am. Rep. 452; *Pacific Exp. Co. v. Darnell*, 62 Tex. 639; *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. R. Co.*, 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725; *Smith v. Osborn*, 143 Mass. 185, 9 N. E. 558; *Frohreich v. Gammon*, 28 Minn. 476, 11 N. W. 88; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Weaver v. Penny*, 17 Ill. App. 628; *Packard v. Slack*, 32 Vt. 9; *Smith v. Green*, 1 C. P. Div. 92; *Riech v. Bolch*, 68 Iowa, 526, 27 N. W. 507; *McAlister v. Chicago, R. I. & P. R. Co.*, 74 Mo. 351; *Jones v. Gilmore*, 91 Pa. 310. See post, p. 68, et seq. See "*Damages*," *Dec. Dig. (Key No.)* §§ 22, 23; *Cent. Dig.* §§ 58-62.

"Sedg. Dam. § 871.

"*Bowen v. King*, 146 N. C. 385, 59 S. E. 1044. See "*Damages*," *Dec. Dig. (Key No.)* §§ 22, 23; *Cent. Dig.* §§ 58-62.

"*Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co.*, 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882; *Vosburg v. Putney*, 78 Wis. 85, 47 N. W. 99; *Id.*, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47; *Davis v. Holy Terror Mtn.*

HALE DAM. (2d Ed.)—5

is simply another way of stating the rule that damages, to be recoverable, must be natural and probable; and it is misleading. Damages, in so far as they are compensatory, are not affected by what was in contemplation by the wrongdoer.<sup>80</sup>

If a tort-feasor expected the injury to result from his wrongful act, which in fact did result, he must be presumed to have intended to cause that particular injury; and the loss would be a direct rather than a consequential one, and compensation could be recovered on the principle already explained.<sup>81</sup> That which a man actually foresees is to him, at all events, natural and probable.<sup>82</sup> All that is required is that the injury be such as would probably result from such a tort under the circumstances.<sup>83</sup> Every person may reasonably be

Co., 20 S. D. 399, 107 N. W. 374; *Bowas v. Pioneer Tow Line*, 2 Sawy. 21, Fed. Cas. No. 1,713. See "*Damages*," *Dec. Dig. (Key No.)* §§ 22-23; *Cent. Dig.* §§ 58-62.

<sup>80</sup> *Briggs v. Brown*, 55 Fla. 417, 46 South. 325; *KENTUCKY HEATING CO. v. HOOD*, 133 Ky. 383, 118 S. W. 337, 22 L. R. A. (N. S.) 588, 134 Am. St. Rep. 457, *Cooley, Cas. Damages*, 35. See "*Damages*," *Dec. Dig. (Key No.)* §§ 20-23; *Cent. Dig.* §§ 55-62.

<sup>81</sup> *Stevens v. Dudley*, 56 Vt. 158, 166. See "*Damages*," *Dec. Dig. (Key No.)* § 20; *Cent. Dig.* §§ 55-57.

<sup>82</sup> *Pol. Torts*, 28.

<sup>83</sup> *Suth. Dam.* § 16; *DOW v. WINNIPESAUKEE GAS & ELECTRIC CO.*, 69 N. H. 312, 41 Atl. 288, 42 L. R. A. 569, 76 Am. St. Rep. 173, *Cooley, Cas. Damages*, 38; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *White v. Ballou*, 8 Allen (Mass.) 408; *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *Stevens v. Dudley*, 56 Vt. 158; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Winkler v. St. Louis, I. M. & S. Ry. Co.*, 21 Mo. App. 99; *Evans v. St. Louis, I. M. & S. Ry. Co.*, 11 Mo. App. 463; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 264, 281, 48 Am. Rep. 622; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Clark v. Chambers*, 3 Q. B. Div. 327. It is enough that the damage is the natural, though not the necessary, result. *Miller v. St. Louis, I. M. & S. Ry. Co.*, 90 Mo. 389, 2 S. W. 439; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74. But see *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Atkinson v. Goodrich Transportation Co.*, 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352. See, also, *Scheffer v. Washington City, V. M. & G. S. R.*

presumed to know what the consequences of his acts will be according to common experience and the usual course of nature, and required to guard against them.<sup>84</sup> To that extent, therefore, a wrongdoer is liable to any person injured by his wrongful acts.<sup>85</sup> But no person can be required to guard against the extraordinary or unusual consequences of an act; and, there being no duty to guard against them, such losses are *damnum absque injuria*.<sup>86</sup> The loss—the *damnum*—is there, but the *injuria* is wanting.

Co., 105 U. S. 249, 26 L. Ed. 1070; *Binford v. Johnston*, 83 Ind. 426, 42 Am. Rep. 508; *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 441; *Eames v. Texas & N. O. R. Co.*, 63 Tex. 660; *Campbell v. City of Stillwater*, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567; *The Notting Hill*, 9 Prob. Div. 105; *Childress v. Yourie*, Meigs (Tenn.) 561; *Forney v. Geldmacher*, 75 Mo. 113, 42 Am. Rep. 388; *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *Lawrence v. Hagerman*, 56 Ill. 68, 2 Am. Rep. 674. See "*Damages*," *Dec. Dig. (Key No.)* § 20; *Cent. Dig.* §§ 55-57.

"One who places another, whom he has made helplessly drunk, in charge of a horse, is presumed to have anticipated the injury which followed. *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42. See, also, *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386; *Bert-holf v. O'Reilly*, 8 Hun. (N. Y.) 16; *Id.*, 74 N. Y. 509, 30 Am. Rep. 323; *Aldrich v. Sager*, 9 Hun. (N. Y.) 537; *Mulcahey v. Givens*, 115 Ind. 286, 17 N. E. 598; *Brink v. Kansas City St. J. & C. B. R. Co.*, 17 Mo. App. 177, 199; *Davis v. Holy Terror Min. Co.*, 20 S. D. 399, 107 N. W. 374; *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 South. 410. See "*Damages*," *Dec. Dig. (Key No.)* § 20; *Cent. Dig.* §§ 55-57.

"*Liming v. Illinois Cent. R. Co.*, 81 Iowa, 246, 47 N. W. 66, where plaintiff was injured while trying to prevent the spread of a fire negligently set by defendant; *Wilson v. Central of Georgia Ry. Co.*, 132 Ga. 215, 63 S. E. 1121. See, also, *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909, where plaintiff was injured through the negligence of a druggist in putting up drugs for another person. See "*Damages*," *Dec. Dig. (Key No.)* § 20; *Cent. Dig.* §§ 55-57.

"*Georgia v. Kepford*, 45 Iowa, 48; *Hack v. Dady*, 134 App. Div. 253, 118 N. Y. Supp. 906, 907. A nervous chill alleged to have been caused by the act of defendant bank in dishonoring plaintiff's check was not a natural result. *American Nat. Bank v. Morey*, 113 Ky. 857, 69 S. W. 759, 58 L. R. A. 956, 101 Am. St. Rep. 379. A woman's illness, resulting from fright, is not the natural result of the shooting of a dog. *Renner v. Canfield*, 36



**29. CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT**—Compensation may be recovered only for such consequential losses resulting from a breach of contract as were natural and probable under the circumstances contemplated by the parties at the time the contract was made.

"There are some important considerations which tend to limit damages in an action upon contract, which have no application to those purely of tort. Contracts are made only by the mutual consent of the respective parties; and each party, for a consideration, thereby consents that the other shall have certain rights as against him, which he would not otherwise possess. In entering into the contract, the parties are supposed to understand its legal effect, and, consequently, the limitations which the law, for the sake of certainty, has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose, the parties may decline to enter into the contract, or may fix their own rule of damages, when, in their nature, the amount must be uncertain. Hence, when

Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654. Plaintiff was in bed, in her house. A quarrel between defendant and her husband so frightened her that she gave premature birth to a child. Defendant did not know of her proximity, nor of her condition. He was held not liable. *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607. See, also, *Rich v. New York Cent. & H. R. R. Co.*, 87 N. Y. 382; *City of Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649; *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Johnson v. Drummond*, 16 Ill. App. 641; *Nelson v. Chicago, M. & St. P. R. Co.*, 30 Minn. 74, 14 N. W. 360; *Royston v. Illinois Cent. R. Co.*, 67 Miss. 376, 7 South. Ct.) 5 N. Y. Supp. 569; *Ellis v. Cleveland*, 55 Vt. 358; *Huxley v. Berg*, 1 Starkie, 98; *Hampton v. Jones*, 58 Iowa, 317, 12 N. W. 276; *Phyfe v. Manhattan R. Co.*, 30 Hun. (N. Y.) 377; *Teagarden v. Hetfield*, 11 Ind. 522; *Gamble v. Mullin*, 74 Iowa, 99, 36 N. W. 909. Damages for loss of prospective offspring cannot be recovered in an action for negligence resulting in a miscarriage. *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46, 42 Am. St. Rep. 738. See "*Damages*," *Dec. Dig.* (Key No.) § 20; *Cent. Dig.* §§ 55-57.

§ 29) CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT 69

suit is brought upon such contract, and it is found that the entire damages actually sustained cannot be recovered without a violation of such rules, the deficiency is a loss, the risk of which the party voluntarily assumed on entering into the contract, for the chance of benefit or advantage which the contract would have given him in case of performance. His position is one in which he has voluntarily contributed to place himself, and in which, but for his own consent, he could not have been placed by the wrongful act of the opposite party alone.

"Again, in the majority of cases upon contract, there is little difficulty, from the nature of the subject, in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done, and where, from the nature of the stipulation or the subject-matter, the actual damages resulting from a breach are more or less uncertain in their nature, or difficult to be shown with accuracy by the evidence, under any definite rule, that there can be any great failure of justice by adhering to such rule as will most nearly approximate the desired result. And it is precisely in these classes of cases that the parties have it in their power to protect themselves against any loss to arise from such uncertainty, by estimating their own damages in the contract itself, and providing for themselves the rules by which the amount shall be measured in case of a breach; and, if they neglect this, they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty, has adopted.

"Again, in analogy to the rule that contracts should be construed as understood and assented to by the parties (if not as a part of that rule), damages which are the natural, and, under the circumstances, the direct and necessary, result of the breach, are often very properly rejected, because they cannot fairly be considered as having been within the contemplation of the respective parties at the time of entering into the contract. None of these several considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation with the wrongdoer by which any hazard of loss should be incurred; nor has he re-

ceived any consideration or chance of benefit or advantage for the assumption of such hazard; nor has the wrongdoer given any consideration nor assumed any risk in consequence of any act or consent of his. The injured party has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages. No act of his has contributed to the injury. He has yielded nothing by consent; and least of all has he consented that the wrongdoer might take or injure his property, or deprive him of his rights, for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show, with certainty, he has sustained by such taking or injury. Especially would it be unjust to presume such consent, and to hold him to the recovery of such damages only as may be measured with certainty by fixed and definite rules, when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. Is he to blame because the case happens to be one of this character? He has had no choice, no selection. The nature of the case is such that the wrongdoer has chosen to make it; and, upon every principle of justice, he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case, and the difficulty of accurately estimating the results of his own wrongful act."<sup>87</sup>

Parties enter into contracts with a view to securing some advantage to themselves, and when one of them is, by the other's breach, deprived of the benefit which the latter contracted he should receive, the fundamental principle of compensation requires the damages for the breach to be in proportion to the benefit which was to have been received. For anything amounting to a direct breach of contract, whether foreseen or unforeseen, the party responsible therefor is liable, because he has contracted that the other party shall receive that very thing; but he is not liable for indirect

<sup>87</sup> *Allison v. Chandler*, 11 Mich. 542. See "*Damages*," *Dec. Dig. (Key No.)* §§ 22, 23; *Cent. Dig.* §§ 58-62.

§ 29) CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT 71

or consequential losses resulting from the breach, unless they are such as the parties may reasonably be presumed to have contemplated at the time the contract was made.<sup>88</sup> The reason is obvious. Defendant's liability rests on the assumption that he has wrongfully deprived plaintiff of a benefit which he had contracted plaintiff should receive; but, as to benefits dependent on circumstances unknown to him, defendant has made no contract, and is therefore not liable for their loss.

*Hadley v. Baxendale*

In *Hadley v. Baxendale*<sup>89</sup> an attempt was made to settle this branch of the law, and a rule was laid down to govern the award of damages for breach of contract, that has been generally accepted both in England and America.<sup>90</sup> In this case the plaintiffs were owners of a steam mill. The shaft was broken, and they gave it to the defendant, a carrier, to take to an engineer, to serve as a model for a new one. On

<sup>88</sup> *Horne v. Midland Ry. Co.*, L. R. 7 C. P. 583; *Leonard v. New York, A. & B. Electric-Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *HEDDEN v. SCHNEBLIN*, 126 Mo. App. 478, 104 S. W. 887, *Cooley, Cas. Damages*, 45; *Hopkins v. Sanford*, 38 Mich. 611; *Paine v. Sherwood*, 19 Minn. 315 (Gil. 270); *Billmeyer v. Wagner*, 91 Pa. 93; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. 49; *WRAGG & SON CO. v. MEAD*, 120 Iowa, 319, 94 N. W. 856, *Cooley, Cas. Damages*, 24; *BROWN v. COWLES*, 72 Neb. 896, 101 N. W. 1020, *Cooley, Cas. Damages*, 51. The use of the phrase that "damages must have been contemplated," or that they must be such as "the parties may be presumed to have contemplated," and the like, is too universal to be gotten rid of. The author conceives the phrase to mean simply that the benefits for loss of which plaintiff claims compensation must be such as the parties may be presumed to have contemplated. See "*Damages*," *Dec. Dig. (Key No.)* § 23; *Cent. Dig.* §§ 58, 62.

<sup>89</sup> *HADLEY v. BAXENDALE*, 9 Exch. 341, 23 Law J. Exch. 179; 18 Jur. 358; 26 Eng. Law & Eq. 398, *Cooley, Cas. Damages*, 39. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

<sup>90</sup> It is said in a note to *Sedgwick on Damages* (page 203) that so entirely is the later law founded on this case that the great body of cases since decided, involving the measure of damages for breach of contract, resolve themselves into a continuous commentary upon it.

making the contract, defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately. He delayed its delivery; the shaft was kept back in consequence; and, in an action for breach of contract, plaintiffs claimed as special damages the loss of profits while the mill was kept idle. It was held that, if the carrier had been made aware that a loss of profits would result from a delay on his part, he would have been answerable. But, as it did not appear that defendant knew that the want of the shaft was the only thing which was keeping the mill idle, he could not be made responsible to such an extent. The court said: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances, from such a breach of contract; for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be

guided in estimating the damages arising out of any breach of contract." <sup>91</sup>

Three rules may be deduced from *Hadley v. Baxendale*: First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable; secondly, that damages which would not arise in the usual course of things from a breach of contract, but which do

<sup>91</sup> The statement of the rule has been criticised as misleading. Thus in *Daugherty v. American Union Tel. Co.*, 75 Ala. 168, 176, 51 Am. Rep. 435, it is said: "What is meant by the words 'in contemplation of the parties?' It would seem that contracting parties—certainly honest ones—do not contemplate the breach of their contracts when they enter into them, and hence cannot contemplate the consequence of a breach. \* \* \* We are aware that the language or phrase we have been criticising has been repeated and re-repeated in many judicial opinions. It has come to be almost a stereotyped phrase; so general that it may appear to be temerity in us to question its propriety. We think, however, it is in itself inapt and inaccurate, and that its import has been greatly and frequently misunderstood. It is often employed in apposition to, or as the synonym of, that other qualifying clause, 'the natural result of,' or 'in the usual course of things.' We think this a great departure from the sense in which Baron Alderson intended it should be understood. Altogether, we think it obscure and misleading, and that an attempt to install it as one of the canons has caused many, very many, erroneous rulings." Substantially the same criticism was made by Baron Martin, who participated in the decision of *Hadley v. Baxendale*, in *Wilson v. Dock Co.*, L. R. 1 Exch. 177. But, as said in *Dickerson v. Finley*, 158 Ala. 149, 48 South. 548, 551: "The very object of making contracts and reducing them to writing is to bind the parties to their performance and to provide against their breach; and when parties make them, however honest they may be, they necessarily project their minds forward, and each party considers: 'What rights am I securing and against what loss am I agreeing to hold the other party harmless?' And this necessarily carries with it the question: 'What are my liabilities, if, for any cause, I fail to carry out my part?' It is no impeachment of a man's integrity to think of the possible damages, but is only good judgment to do so." It has also been said that in New York the phrase "such as may fairly be supposed to have been in contemplation of the parties" is used as the equivalent of "the usual course of things," thus leading to much confusion. See Sedgwick on Damages, 209. But it is doubtful if this criticism is justified.

arise from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broken the contract; thirdly, that where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under those special circumstances, then such special damage must be supposed to have been contemplated by the parties to the contract, and is recoverable. A further rule is implied, viz. that damage which cannot be considered as fairly and naturally arising from breach of contract under any given circumstances is not recoverable, whether those circumstances were or were not known to the person who is being charged.<sup>92</sup>

*First Rule of Hadley v. Baxendale—Damages Arising under Ordinary Circumstances*

Under the rule of *Hadley v. Baxendale*, actual contemplation of the consequences of a breach of contract is not at all essential to liability, if the consequences are in fact natural ones. Under the doctrine of that case, damages may be recovered for both the natural consequences of the breach—that is, such consequences as would ordinarily result from a breach of similar contracts—and such consequences as seem natural only in the light of special circumstances communicated to defendant at the time the contract was made.<sup>93</sup> “It

<sup>92</sup> Mayne, *Dam.* (8th Ed.) 14.

<sup>93</sup> *Collard v. Railroad Co.*, 7 Hurl. & N. 79; *Gee v. Railroad Co.*, 6 Hurl. & N. 211; *Wilson v. Railroad Co.*, 9 C. B. (N. S.) 632; *Smeed v. Foord*, 1 El. & El. 602; *Guetzkow Bros. Co. v. Andrews*, 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909; *Wilson v. Dock Co.*, L. R. 1 Exch. 177; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 750, 6 Am. Rep. 165; *Ward v. New York Cent. R. Co.*, 47 N. Y. 29, 32, 7 Am. Rep. 405; *Dickerson v. Finley*, 158 Ala. 149, 48 South. 548; *HARPER FURNITURE CO. v. SOUTHERN EXPRESS CO.*, 148 N. C. 87, 62 S. E. 145, 30 L. R. A. (N. S.) 483, 128 Am. St. Rep. 588, *Cooley, Cas. Damages*, 53; *Furstenburg v. Fawsett*, 61 Md. 184; *Hopkins v. Sanford*, 38 Mich. 611; *Central Trust Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 293; *McDonald v. Kansas City Bolt & Nut Co.*, 79 C. C. A. 298, 149 Fed. 360, 8 L. R. A. (N. S.) 1110; *D. A. Tompkins Co. v. Monticello Cotton Oil Co.* (C. C.) 153 Fed. 817; *HUNT BROS.*

§ 29) CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT 75

is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made; and, if the contract is made with reference to special circumstances fixing or affecting the amount of damages, such special circumstances are regarded as within the contemplation of the parties, and damages may be assessed accordingly." 84 This

CO. v. SAN LORENZO WATER CO., 150 Cal. 51, 87 Pac. 1093, 7 L. R. A. (N. S.) 913, Cooley, Cas. Damages, 48; Winston Elevator & Machine Co. v. Hoffman, 107 Md. 621, 69 Atl. 394, 17 L. R. A. (N. S.) 1130; Boyden v. Hill, 198 Mass. 477, 85 N. E. 413; Dunning v. Reid, 76 N. J. Law, 384, 69 Atl. 1013; Sargent v. Mason, 101 Minn. 319, 112 N. W. 255; J. WRAGG & SONS CO. v. MEAD, 120 Iowa, 319, 94 N. W. 856, Cooley, Cas. Damages, 24; BROWN v. COWLES, 72 Neb. 896, 101 N. W. 1020, Cooley, Cas. Damages, 51; Anderson v. Savoy, 137 Wis. 44, 118 N. W. 217; Malueg v. Hatten, 140 Wis. 381, 122 N. W. 1057; Bigham v. Wabash-Pittsburgh Terminal R. Co., 223 Pa. 106, 72 Atl. 318; DAVIDSON DEVELOPMENT CO. v. SOUTHERN R. CO., 147 N. C. 503, 61 S. E. 381, Cooley, Cas. Damages, 218, holding that damages are natural and probable only when they may be reasonably supposed to have been in contemplation of the parties when the contract was made; Boutin v. Rudd, 27 C. C. A. 526, 82 Fed. 685, holding that if a contract is made under special circumstances, communicated to both parties, the damages arising from a breach are not only those arising naturally, according to the usual course of things, but also those which would ordinarily follow a breach under such special circumstances. The rule has even been applied where the failure to perform the contract resulted in anguish and distress of mind. Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249. But see Beaulieu v. Great Northern R. Co., 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564, holding that in cases of breach of contract recovery can be had for mental distress only when the breach is in effect an independent willful tort. See "Carriers," Dec. Dig. (Key No.) § 105; Cent. Dig. §§ 451-458.

"Booth v. Spuyten Duyvil Rolling-Mill Co., 60 N. Y. 487, 492; TAYLOR v. SPENCER, 75 Kan. 152, 88 Pac. 544, Cooley, Cas. Damages, 42; HEDDEN v. SCHNEBLIN, 126 Mo. App. 478, 104 S. W. 887, Cooley, Cas. Damages, 45; Winslow Elevator & Machine Co. v. Hoffman, 107 Md. 621, 69 Atl. 394, 17 L. R. A. (N. S.) 1130; HAMMER v. SCHOENFELDER, 47 Wis. 455, 2 N. W. 1129, Cooley, Cas. Damages, 47. See "Damages," Dec. Dig. (Key No.) § 23; Cent. Dig. §§ 58, 62.



is well illustrated by an English case.<sup>95</sup> The defendants had built a floating boom derrick, which had been left on their hands. Plaintiffs agreed to buy the hull of the derrick, which defendants were to empty of machinery, and deliver, by a certain date. Plaintiffs intended to place in the hull hydraulic cranes to transship coal from colliers to barges without the necessity of any intermediate landing. This purpose was entirely novel and unknown to defendants, who supposed that plaintiffs intended to use the hull for a coal store, which was the most obvious use to which such a vessel could be applied by a person in the coal trade, though the vessel itself, being the first of its kind ever built, was entirely novel, and had never been applied to such a purpose. If the vessel had been intended as a coal store, as defendants contemplated, plaintiffs would have been damaged £420 by its nondelivery at the time fixed; but they in fact suffered much greater damage, owing to preparations to use it in the manner for which it was bought. Plaintiffs conceded that this greater sum could not be recovered because such purpose was unknown to defendants; and defendants contended that, under the rule of *Hadley v. Baxendale*, even the £420 could not be recovered, because such loss resulted from inability to use the vessel in a manner not contemplated by plaintiffs. It was held, however, that defendants were liable for the £420, as that loss was the natural consequence of the breach; the use of the hull as a coal store being the most obvious use to which it was applicable. Blackburn, J., said: "That argument seems to assume that the principle laid down in *Hadley v. Baxendale* is that the damages can only be what both parties contemplated, at the time of making the contract, would be the consequence of the breach of it; but that is not the principle of *Hadley v. Baxendale*. The court say: 'We think the proper rule in such a case as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such

<sup>95</sup> *Cory v. Thames, I. W. & S. B. Co.*, L. R. 3 Q. B. 181, 188. See, also, *Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Material v. Armstrong*, L. R. 9 Q. B. 473, 43 Law J. Q. B. 211.

§ 29) CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT 77

breach of contract should be such as may fairly and reasonably be considered, either arising naturally—i. e. according to the usual course of things—from such breach of contract itself [that is one alternative], or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.”<sup>96</sup>

The first rule of *Hadley v. Baxendale*—that is, that damages arising naturally from a breach of contract may be recovered, whether actually contemplated or not—simply means that compensation may be recovered for the loss of those benefits which, by a fair construction of the contract, the parties intended, or must be presumed to have intended, to confer.

*Second Rule of Hadley v. Baxendale—Damages Arising from Circumstances Not Contemplated*

Damages resulting from a breach of contract which were not contemplated by defendant, but arise from special circumstances unknown to him, cannot be compensated.<sup>97</sup> This

<sup>96</sup> See, also, *Hammond v. Bussey*, 20 Q. B. Div. 79, 88. See “*Damages*,” *Dec. Dig. (Key No.)* § 23; *Cent. Dig.* §§ 58, 62.

<sup>97</sup> *HUNT BROS. CO. v. SAN LOVENZO WATER CO.*, 150 Cal. 51, 87 Pac. 1093, 7 L. R. A. (N. S.) 913, *Cooley, Cas. Damages*, 48; *BROWN v. COWLES*, 72 Neb. 896, 101 N. W. 1020, *Cooley, Cas. Damages*, 51; *Devlin v. Mayor, etc., of City of New York*, 63 N. Y. 8, 25; *Dickerson v. Finley*, 158 Ala. 149, 48 South. 548; *ILLINOIS CENT. R. CO. v. JOHNSON & FLEMING*, 116 Tenn. 624, 94 S. W. 600, *Cooley, Cas. Damages*, 57; *Winslow Elevator & Machine Co. v. Hoffman*, 107 Md. 621, 69 Atl. 394, 17 L. R. A. (N. S.) 1130; *McDonald v. Kansas City Bolt & Nut Co.*, 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *H. G. Holloway & Bro. v. White Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; *WESTERN UNION TEL. CO. v. TWADDELL*, 47 Tex. Civ. App. 51, 103 S. W. 1120, *Cooley, Cas. Damages*, 230; *Enright v. American Belgian Lamp Co.*, 26 App. Div. 381, 49 N. Y. Supp. 739; *Milbous v. Atlantic Coast Line R. Co.*, 75 S. E. 351, 55 S. E. 764; *Kelly v. Fahrney*, 97 Fed. 176, 38 C. C. A. 103; *Brauer v. Oceanic Steam Navigation Co.*, 34 Miss. Rep. 127, 69 N. Y. Supp. 465. See “*Damages*,” *Dec. Dig. (Key No.)* § 23; *Cent. Dig.* §§ 58, 62; “*Carriers*,” *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

is the second rule of *Hadley v. Baxendale*, and the one which governed the decision in that case.<sup>98</sup> Compensation is refused in such cases for the reason that the loss is not a natural and probable consequence of the breach. Under no circumstances can compensation be recovered for losses which do not flow naturally and probably—i. e. proximately—from the act complained of.<sup>99</sup> The rule allowing compensation for losses arising from special circumstances, when such circumstances were made known to defendant, is no exception to this principle, for such losses are in fact natural consequences. The only effect of notice of special circumstances is to enlarge the domain of natural consequences,<sup>100</sup> and make certain consequences natural which would not be such otherwise. Only the natural and proximate consequences of the facts made known can be recovered. The stoppage of a mill is not a natural result of a failure to deliver goods, and cannot be compensated unless defendant had notice that it would result from a nondelivery.<sup>101</sup>

\* In *HARPER FURNITURE CO. v. SOUTHERN EXPRESS CO.*, 148 N. E. 87, 62 S. E. 145, 149, 30 L. R. A. (N. S.) 483, 128 Am. St. Rep. 588, Cooley, Cas. Damages, 53, it is said: "It may be observed that this great case is important rather as laying down the general principles by which damages for breach of contract may be correctly ascertained than as a decision on the facts of the particular case. In evidence of this it may be noted that, as a matter of fact, the proof showed that defendant's clerk was notified that plaintiff's mill would be stopped while the shaft was being repaired. Just why this fact was ignored in the opinion of the judges does not appear, possibly because the notice referred to was given the day before the shaft was delivered for shipment—not, it seems, a very satisfactory explanation."

<sup>98</sup> *Smeed v. Foord*, 1 El. & El. 602. See "*Damages*," *Dec. Dig. (Key No.)* § 23; *Cent. Dig.* §§ 58, 62.

<sup>99</sup> *Sedg. Dam.* § 157. *Central Trust Co. of New York v. Clark*, 92 Fed. 293, 34 C. C. A. 354; *Boutin v. Rudd*, 82 Fed. 685, 27 C. C. A. 526. See "*Damages*," *Dec. Dig. (Key No.)* § 23; *Cent. Dig.* §§ 58, 62.

<sup>100</sup> *Gee v. Railroad Co.*, 6 Hurl. & N. 211; *Central Trust Co. of New York v. Clark*, 92 Fed. 293, 34 C. C. A. 354; *Pine Bluff Iron Works v. Boling & Bro.*, 75 Ark. 469, 88 S. W. 306; *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. 275, 79 S. W. 1052; *HADLEY v. BAXENDALE*, 9 Exch. 341, Cooley, Cas. Damages,

The purchaser of goods cannot recover, as damages for non-delivery, profits which would have been gained under a particular contract of resale, unless the seller had notice of such particular contract.<sup>102</sup> On a breach of contract not to engage in a particular business for a certain period, loss of profits after the expiration of such period were not within the contemplation of the parties.<sup>103</sup> Nor is loss of hire of goods a natural consequence of a carrier's delay in delivering them, where the carrier was not informed of the purpose for which they were shipped.<sup>104</sup> So, also, in the absence of notice, no

39. But see note 98, *supra*. For breach of a warranty that a horse is kind, the only damages in contemplation of the parties in consequence of a breach is the diminution in value of the horse, and compensation for the breaking of plaintiff's wagon and harness in consequence of the unkindness of the horse cannot be recovered. *Case v. Stevens*, 137 Mass. 551. A carrier is not liable for damages for delay in the construction of a house caused by its loss of plans. *Mather v. American Exp. Co.*, 138 Mass. 55, 52 Am. Rep. 258. Damages for breach of a contract to supply boilers to be used in a pleasure boat at a summer resort are the rental value of the boat during the period of delay. *Brownell v. Chapman*, 84 Iowa, 504, 51 N. W. 249, 35 Am. St. Rep. 326. Where there is a special contract to deliver apples to a connecting carrier by a certain date, made for the purpose of avoiding the danger of the apples freezing on the connecting line, damage to the apples by freezing is a natural consequence of delay. *Fox v. Boston & M. R. Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702. Demurrage paid to a railroad company is a natural consequence of a breach of contract to load tiles on a vessel from a train. *Welch v. Anderson*, 61 Law J. Q. B. 167. See "*Damages*," *Dec. Dig. (Key No.)* § 23; *Cent. Dig.* §§ 58, 62.

<sup>102</sup> *Wappoo Mills v. Commercial Guano Co.*, 91 Ga. 396, 18 S. E. 308; *Carpenter v. First Nat. Bank*, 119 Ill. 352, 10 N. E. 18; *H. G. Holloway & Bro. v. White-Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>103</sup> *Salinger v. Salinger*, 69 N. H. 509, 45 Atl. 558. See "*Damages*," *Dec. Dig. (Key No.)* § 23; *Cent. Dig.* §§ 58, 62.

<sup>104</sup> *Hales v. Railroad Co.*, 4 Best & S. 66, 32 Law J. Q. B. 292; *Frazer v. Smith*, 60 Ill. 145. See, also, *New York Academy of Music v. Hackett*, 3 Hilt. (N. Y.) 217; *Morgan v. Negley*, 53 Pa. 153; *Arrowsmith v. Gordon*, 3 La. Ann. 105; *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356; *Benziger v. Miller*, 50 Ala. 206; *Aldrich v. Goodell*, 75 Ill. 452; *Piper v. Kingsbury*, 48 Vt. 480; *Pros-*

consequential damages can be recovered for delay in transmitting cipher telegrams.<sup>105</sup> The rule that damages for breach of contract, arising from special circumstances not known to defendant cannot be recovered would seem to be almost a truism. Starting with the proposition that damages, to be recoverable in any case, must be natural and probable—i. e., proximate—by the very definition of “natural” and “probable,” damages dependent on special and unknown circumstances are excluded.

*Third Rule of Hadley v. Baxendale—Notice of Special Circumstances*

As was said above, the effect of notice of special circumstances is to make certain consequences of the breach of contract natural which would not otherwise be so.<sup>106</sup> Therefore, if, at the time of making a contract, notice is given of the purpose of making it, or of special circumstances affecting

ser v. Jones, 41 Iowa, 674; Holloway v. Stephens, 2 Thomp. & C. (N. Y.) 658; Fort v. Orndoff, 7 Heisk. (Tenn.) 167; Keith's Ex'r v. Hinkston, 9 Bush (Ky.) 283; Noble v. Ames Mfg. Co., 113 Mass. 492. Where a machine is totally ruined in transportation, the carrier is liable for its whole value; but, where it had no notice that the machine was to be used by plaintiff in his business, it is not liable for the loss of the use of the machine while another was being procured to supply the place of the one destroyed. Thomas, B. & W. Mfg Co. v. Wabash, St. L. & P. Ry. Co., 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725. See “Carriers,” Dec. Dig. (Key No.) § 105; Cent. Dig. §§ 451–458.

<sup>105</sup> PRIMROSE v. WESTERN UNION TEL. CO., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, Cooley, Cas. Damages, 237; Sanders v. Stuart, 1 C. P. Div. 326; Western Union Tel. Co. v. Wilson, 32 Fla. 527, 14 South. 1, 22 L. R. A. 434, 37 Am. St. Rep. 125; Mackay v. Western Union Tel. Co., 16 Nev. 222; Cannon v. Same, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; Daniel v. Western Union Tel. Co., 61 Tex. 452, 48 Am. Rep. 305; Candee v. Western Union Tel. Co., 34 Wis. 471, 17 Am. Rep. 452. Contra, Daugherty v. American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435. See post, p. 411. See “Telegraphs and Telephones,” Dec. Dig. (Key No.) § 67; Cent. Dig. §§ 64–68.

<sup>106</sup> Central Trust Co. of New York v. Clark, 92 Fed. 293, 34 C. C. A. 354. See “Damages,” Dec. Dig. (Key No.) § 23; Cent. Dig. §§ 58, 62.

§ 29) CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT 81

the quantum of damages likely to result from a breach, damages may be recovered for all the natural and probable consequences of a breach under those circumstances.<sup>107</sup> This is the third rule of *Hadley v. Baxendale*. The reason for it is found in the fundamental principle of compensation underlying the entire law of damages. The amount of benefit

<sup>107</sup> *Central Trust Co. of New York v. Clark*, 92 Fed. 293, 34 C. A. 354; *McDonald v. Kansas City Bolt & Nut Co.*, 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *Liman v. Pennsylvania R. Co.*, 4 Misc. Rep. 539, 24 N. Y. Supp. 824; *Towles v. Atlantic Coast Line R. Co.*, 83 S. C. 501, 65 S. E. 638; *HARPER FURNITURE CO. v. SOUTHERN EXPRESS CO.*, 148 N. C. 87, 62 S. E. 145, 30 L. R. A. (N. S.) 483, 128 Am. St. Rep. 588, *Cooley, Cas. Damages*, 53; *Boutin v. Rudd*, 82 Fed. 685, 27 C. C. A. 526; *Pacific Sheet Metal Works v. California Canneries Co.*, 164 Fed. 980, 91 C. C. A. 108, affirming (C. C.) 144 Fed. 886; *Anderson v. Savoy*, 137 Wis. 44, 118 N. W. 217; *Perry Tie & Lumber Co. v. Reynolds*, 100 Va. 264, 40 S. E. 919.

The damages recoverable are such as ordinarily arise according to the intrinsic nature of the contract, and the surrounding facts and circumstances made known to the parties at the time of making it. *Suth. Dam.* § 51; *Davis v. Talcott*, 14 Barb. (N. Y.) 611; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa, 601; *Haven v. Wakefield*, 39 Ill. 509; *ILLINOIS CENT. R. CO. v. COBB*, 64 Ill. 128, *Cooley, Cas. Damages*, 65; *Winne v. Kelley*, 34 Iowa, 339; *Van Arsdale v. Rundel*, 82 Ill. 63; *Rogers v. Bemus*, 69 Pa. 432; *Hinckley v. Beckwith*, 13 Wis. 34; *Leonard v. New York, A. & B. Electro Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Scott v. Rogers*, 31 N. Y. 676; *Hexter v. Knox*, 63 N. Y. 561; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Fletcher v. Taylor*, 17 C. B. 21; *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Borradaile v. Brunton*, 8 Taunt. 535; *In re Trent & Humber Co.*, L. R. 6 Eq. 396; *Dewint v. Wiltse*, 9 Wend. (N. Y.), 325; *Dobbins v. Duquid*, 65 Ill. 464; *Shepard v. Milwaukee Gas-Light Co.*, 15 Wis. 318, 82 Am. Dec. 679; *Richardson v. Chynoweth*, 26 Wis. 656; *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438; *Benton v. Fay*, 64 Ill. 417; *Grindle v. Eastern Exp. Co.*, 67 Me. 317, 24 Am. Rep. 31; *Hamilton v. Magill*, 12 L. R. Ir 186, 204. Where there is notice of special use for premises. *Hexter v. Knox*, 63 N. Y. 561; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501; *Haven v. Wakefield*, 39 Ill. 509. Notice of special use for funds. *Grindle v. Eastern Exp. Co.*, 67 Me. 317, 24 Am. Rep. 31. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig. §§ 451-458*; "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig. §§ 64-68*.

HALF DAM. (2D ED.)—6

which a party to a contract would derive from its performance is the measure of damages for its breach.<sup>108</sup> Where defendant knows that plaintiff contracts for the purpose of securing a special benefit, he must be deemed to have contracted that plaintiff should receive such benefit, and he is liable for a breach accordingly.<sup>109</sup> The intention of the parties must be arrived at by interpreting the contract in the light of the surrounding circumstances known to both parties, and such circumstances form as much a part of the contract as if they were written into it. If the special circumstances were in fact written into the contract, the damages arising from a breach under those circumstances would be direct, and not consequential.<sup>110</sup> If a contract of sale is made to enable the vendor to secure a special benefit, and that object is known to defendant, the principle of just compensation requires him to make good the loss arising from his failure to deliver the goods.<sup>111</sup> In such case, the contract, interpreted in the light

<sup>108</sup> *Alder v. Keighley*, 15 Mees. & W. 117. See "Damages," *Dec. Dig.* (Key No.) § 117; *Cent. Dig.* §§ 285, 286.

1) <sup>109</sup> In an action for breach of a contract which was made to enable plaintiff to fulfill another contract with a third person, of which purpose defendant had notice, damages for the loss on such subcontract may be recovered. *Borries v. Hutchinson*, 18 C. B. (N. S.) 445, 463; *Elbinger Actien-Gesellschaft für Fabrication von Eiseubahn Material v. Armstrong*, L. R. 9 Q. B. 473, 479; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85, 89; *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422. If there is notice of the subcontract but not of the price, if the price is reasonable, the profits of the subcontract may be recovered. *ILLINOIS CENTRAL R. CO. v. COBB*, 64 Ill. 128, *Cooley, Cas. Damages*, 65; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa, 601. But not if it is extravagant or of an unusual and exceptional character. *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Horne v. Midland R. Co.*, L. R. 7 C. P. 583; *Gutzkow Bros. Co. v. Andrews*, 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909; *Lewis v. Rountree*, 79 N. C. 122, 28 Am. Rep. 309; *Snell v. Cottingham*, 72 Ill. 161. See "Carriers," *Dec. Dig.* (Key No.) § 105; *Cent. Dig.* §§ 451-458; "Telegraphs and Telephones," *Dec. Dig.* (Key No.) § 67; *Cent. Dig.* §§ 64-68.

<sup>110</sup> *Suth. Dam.* § 50; *Sedg. Dam.* § 160.

<sup>111</sup> *HAMMER v. SCHOENFELDER*, 47 Wis. 455, 2 N. W. 1129, *Cooley, Cas. Damages*, 47; *Perry Tie & Lumber Co. v. Reynolds*,

§ 29) CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT 83

of the object for which it was made, is more than a mere contract of sale.<sup>112</sup> The notice cannot require the performance of any additional act to fulfill the contract, for that would be making a new and different contract, and a written contract could not be so varied by parol. A verbal notice is sufficient to enlarge the damages recoverable for the breach of a written contract.<sup>113</sup>

Mere knowledge will not increase the damages recoverable for a breach.<sup>114</sup> Thus knowledge that a building is to be used as an office building will not make a contractor who has failed to put in a proper elevator liable for loss of rents.<sup>115</sup> So, too, the mere knowledge of the vendor of goods that they are bought for resale is not notice on which a claim for particular profits can be based.<sup>116</sup> The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person with whom he is contracting reasonably believes that he accepts the contract with the special condition attached to it.<sup>117</sup> The knowl-

100 Va. 264, 40 S. E. 919. See, also, *Manning v. Fitch*, 138 Mass. 273; *Beeman v. Banta*, 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779. See post, p. 361. See "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>112</sup> *Suth. Dam.* § 50.

<sup>113</sup> See *Hydraulic Engineering Co. v. M'Haffie*, 4 Q. B. Div. 670. See "Carriers," *Dec. Dig. (Key No.)* §§ 105, 135; *Cent. Dig.* §§ 451-458.

<sup>114</sup> *Sedg. Dam.* § 150; *WESTERN UNION TEL. CO. v. TWADDELL*, 47 Tex. Civ. App. 51, 103 S. W. 1120, *Cooley, Cas. Damages*, 230; *British Columbia & Vancouver's Island Spar Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499, 37 Law J. C. P. 235. See "Telegraphs and Telephones," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 64-68.

<sup>115</sup> *Winslow Elevator and Machine Co. v. Hoffman*, 107 Md. 621, 69 Atl. 394, 17 L. R. A. (N. S.) 1130. Compare *Smith v. Flanders*, 129 Mass. 322. See "Damages," *Dec. Dig. (Key No.)* §§ 22, 23, 40; *Cent. Dig.* §§ 59-62, 72-88.

<sup>116</sup> *H. G. Holloway & Bro. v. White-Durham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704. See "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>117</sup> *British Columbia & Vancouver's Island Spar Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499, 37 Law J. C. P. 235; *Smeed v. Foord*, 1 El. & El. 602, 608; *Booth v. Spuyten Duyvil*



edge or notice must form the basis of the contract, though it need not form part of it.<sup>118</sup>

The notice should be sufficient in detail to advise the person sought to be held of the nature of the special circumstances. Thus, if the price to be received under the subcontract is unusual or in excess of the reasonable price, notice of that fact should be given.<sup>119</sup> There are, however, certain things knowledge or notice of which will be presumed, such as the usual course of business.<sup>120</sup> Thus, one who sells a farmer diseased sheep will be presumed to know that the buyer probably had other sheep to which the disease would be communicated, thus increasing the damages.<sup>121</sup> So, too, when a very heavy engine shaft was shipped by express, instead of freight, to a company known to the express company to be engaged in the manufacture of furniture, these facts were sufficient to put the express company on notice that

Rolling-Mill Co., 60 N. Y. 487; *Clark v. Moore*, 3 Mich. 55, 61; *Snell v. Cottingham*, 72 Ill. 161; *Brauer v. Oceanic Steam Navigation Co.*, 34 Wisc. Rep. 127, 69 N. Y. Supp. 465; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131; *Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Materiel v. Armstrong*, L. R. 9 Q. B. 473, 43 Law J. Q. B. 211. See "*Damages*," *Dec. Dig. (Key No.)* §§ 23, 40; *Cent. Dig.* §§ 58, 62, 72-88.

<sup>118</sup> *Booth v. Spuyten Duyvil Rolling-Mill Co.*, 60 N. Y. 487; *ILLINOIS CENT. R. CO. v. JOHNSON & FLEMING*, 116 Tenn. 624, 94 S. W. 600, *Cooley, Cas. Damages*, 57. See *Sedg. Dam.* §§ 159, 160. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 105, 135; *Cent. Dig.* §§ 451-458.

<sup>119</sup> *Booth v. Spuyten Duyvil Rolling-Mill Co.*, 60 N. Y. 487; *Guetzkow Bros. Co. v. Andrews*, 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909; *Snell v. Cottingham*, 72 Ill. 161. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>120</sup> *Grebert-Borgnis v. Nugent*, L. R. 15 Q. B. Div. 85 (that plaintiff would be liable in damages for breach of his subcontract); *TAYLOR v. SPENCER*, 75 Kan. 152, 88 Pac. 544, *Cooley, Cas. Damages*, 42 (that mineral water was purchased to be resold). Compare *Swift v. Eastern Warehouse Co.*, 86 Ala. 294, 5 South. 505. See "*Damages*," *Dec. Dig. (Key No.)* §§ 22, 23; *Cent. Dig.* §§ 59-63.

<sup>121</sup> *Sherrod v. Langdon*, 21 Iowa, 518. See, also, *Mullett v. Mason*, L. R. 1 C. P. 559; *Smith v. Green*, 1 C. P. Div. 92. See "*Sales*," *Dec. Dig. (Key No.)* §§ 166, 418; *Cent. Dig.* §§ 402, 1201.

damages beyond the ordinary amount might reasonably be expected in case of delay in transportation.<sup>122</sup>

The notice, to be effective, must be given at the time the contract was made,<sup>123</sup> and notice given after the breach is not sufficient.<sup>124</sup> Thus, where a claim of special damage is based on delay in the carriage of goods, it must appear that notice of the special circumstances was given at the time of shipment, and a notice given after the delay has occurred will be insufficient.<sup>125</sup>

Mr. Mayne states the result of the decisions on this subject as follows:<sup>126</sup> "First. Where there are special circumstances connected with a contract which may cause special damage to follow if it is broken, mere notice of such special circumstances given to one party will not render him liable for the special damage, unless it can be inferred from the whole transaction that he consented to become liable for such

<sup>122</sup> HARPER FURNITURE CO. v. SOUTHERN EXP. CO., 148 N. C. 87, 63 S. E. 145, 30 L. R. A. (N. S.) 483, 128 Am. St. Rep. 588, Cooley, Cas. Damages, 53. See "Damages," Dec. Dig. (Key No.) § 22, 23, 40; Cent. Dig. §§ 58-63, 72-88.

<sup>123</sup> Hooks Smelting Co. v. Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052, holding that notice that delay in furnishing certain repairs would result in idleness of a mill must be given before the price is fixed; PATTERSON v. ILLINOIS CENT. R. CO., 123 Ky. 783, 97 S. W. 426, Cooley, Cas. Damages, 60. See "Damages," Dec. Dig. (Key No.) §§ 22, 23, 40; Cent. Dig. §§ 58-63, 72-88; "Carriers," Dec. Dig. (Key No.) §§ 105, 135; Cent. Dig. §§ 451-458.

<sup>124</sup> Tillinghast-Styles Co. v. Providence Cotton Mills, 143 N. C. 268, 55 S. E. 621; PATTERSON v. ILLINOIS CENT. R. CO., 123 Ky. 783, 97 S. W. 426, Cooley, Cas. Damages, 60. See "Damages," Dec. Dig. (Key No.) §§ 22, 23, 40; Cent. Dig. §§ 58-63, 72-88; "Carriers," Dec. Dig. (Key No.) §§ 105, 135; Cent. Dig. §§ 451-458.

<sup>125</sup> Towles v. Atlantic Coast Line R. Co., 83 S. C. 501, 65 S. E. 638 (criticising Bourland v. Choctaw, O. & G. R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A. [N. S.] 1111, 122 Am. St. Rep. 653); PATTERSON v. ILLINOIS CENT. R. CO., 123 Ky. 783, 97 S. W. 426, Cooley, Cas. Damages, 60; Crutcher v. Choctaw, O. & G. R. Co., 74 Ark. 358, 85 S. W. 770; ILLINOIS CENT. R. CO. v. JOHNSON & FLEMING, 116 Tenn. 624, 94 S. W. 600, Cooley, Cas. Damages, 57. See "Carriers," Dec. Dig. (Key No.) § 105; Cent. Dig. §§ 451-458.

<sup>126</sup> Mayne, Dam. 47.

special damage. Secondly. Where a person who has knowledge or notice of such special circumstances might refuse to enter into the contract at all, or might demand a higher remuneration for entering into it, the fact that he accepts the contract without requiring any higher rate will be evidence, though not conclusive evidence, from which it may be inferred that he has accepted the additional risk in case of breach. Thirdly. Where the defendant has no option of refusing the contract,<sup>127</sup> and is not at liberty to require a higher rate of remuneration, the fact that he proceeded in the contract after knowledge or notice of such special circumstances is not a fact from which an undertaking to incur a liability for special damages can be inferred."

*General Result of Hadley v. Baxendale*

Hadley v. Baxendale introduced no new rule of damages.<sup>128</sup> It is simply a statement, in rather more specific form, of the general principle that damages, to be recoverable, must be natural and probable. To determine the natural and probable results of a breach of contract, we must first know its meaning, and we learn this by interpreting the contract in the light of all the circumstances known to the parties at its execution. Liability in cases of contract is founded on consent. One can reasonably be presumed to consent to liability only for what is at the time natural and probable under the circumstances then contemplated. Consequences that, in the usual course of things, follow the breach of similar contracts, are natural consequences; and the parties may fairly be presumed to have contemplated them, and to have consented to liability to that extent in case of breach. Where the damages arise from special circumstances, the parties cannot be presumed to have contemplated them, and to have consented to liability, unless such circumstances were made known to them. Where such circumstances are in fact made known, there is no longer any

<sup>127</sup> As in case of common carriers.

<sup>128</sup> Sedg. Dam. 211. See, also, *Brauer v. Oceanic Steam Navigation Co.*, 34 Misc. Rep. 127, 69 N. Y. Supp. 465. See "Damages," *Dec. Dig. (Key No.)* §§ 22, 23; *Cent. Dig.* §§ 58-63; "Carriers," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

reason for treating them as special, and damages arising under such circumstances are considered natural and probable.

*Motive Inducing Breach*

Since liability for a breach of contract is dependent on the circumstances known at its execution, the motive which induced the violation of the contract cannot be shown either to increase or diminish the amount of the recovery. Actions for breach of promise of marriage constitute the only exception to this rule. "It frequently happens that circumstances of fraud, malice, or violence give rise to an action of tort as an alternative remedy; but, where the plaintiff chooses to sue upon the contract, he lets in all the consequences of that form of action."<sup>129</sup> It has sometimes been held that, for breach of a contract to convey land, the vendor would be liable to higher damages if he had acted in bad faith than if he had acted innocently. The cases are conflicting, and will be considered in a later chapter.<sup>130</sup> In England the doctrine has been finally overruled. "The fraud may give rise to an action for deceit. But, as long as the plaintiff chooses to sue for breach of contract, he cannot, by establishing misconduct on the part of the defendant, alter the rule by which damages for breach of contract are assessed."<sup>131</sup>

### AVOIDABLE CONSEQUENCES

- 30. Compensation cannot be recovered for injuries which the injured party, by due and reasonable diligence, after notice of the wrong, could have avoided. Such consequences are regarded as remote, the injured party's will having intervened as an independent cause.**

Compensation for a wrong is limited to such consequences as the injured party could not have avoided by reasonable dili-

<sup>129</sup> Mayne, Dam. 49.

<sup>130</sup> Mayne, Dam. 50.

<sup>131</sup> Post, c. 13.

gence.<sup>132</sup> If the consequences of the wrongful act could have been avoided by ordinary care and reasonable diligence and expense, they will be regarded as remote.<sup>133</sup> The injured party's own negligence or willful fault in failing to take reasonable precautions to reduce the damage, after notice of defendant's wrong, is the proximate cause of such injuries.<sup>134</sup> The rule is the same in cases of contract and cases of tort.<sup>135</sup>

When a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertion, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent.<sup>136</sup> Similarly in the case of injury to the person or to property it is the duty of the one suffering from the wrong, to use ordinary care and reasonable exertions to lessen the resulting loss.<sup>137</sup>

<sup>132</sup> *Loker v. Damon*, 17 Pick. (Mass.) 284; *Indianapolis, B. & W. Ry. Co. v. Birney*, 71 Ill. 391; *Salladay v. Town of Dodgeville*, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; *Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638; *Grindle v. Eastern Exp. Co.*, 67 Me. 317, 24 Am. Rep. 31; *Sutherland v. Wyer*, 67 Me. 64; *Simpson v. City of Keokuk*, 34 Iowa, 568. Recovery for repeated entries made by defendant's cattle through an unrepaired break in plaintiff's fence should be limited to such entries as occur before plaintiff has had reasonable time to repair such break. *Watkins v. Rist*, 67 Vt. 284, 31 Atl. 413. See "Damages," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>133</sup> *Loker v. Damon*, 17 Pick. (Mass.) 284. See, also, *Thompson v. Shattuck*, 2 Metc. (Mass.) 615. See "Damages," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>134</sup> *Loker v. Damon*, 17 Pick. (Mass.) 284. See "Damages," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>135</sup> *Sutherland v. Wyer*, 67 Me. 64; *SHERMAN CENTER TOWN CO. v. LEONARD*, 46 Kan. 354, 26 Pac. 717, 28 Am. St. Rep. 101, *Cooley, Cas. Damages*, 74; *Brown v. Weir*, 95 App. Div. 78, 88 N. Y. Supp. 479; *Louisville & N. R. Co. v. Sullivan Timber Co.*, 138 Ala. 379, 35 South. 327. See "Damages," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>136</sup> *Warren v. Stoddart*, 105 U. S. 224, 229, 26 L. Ed. 1117; *LAWRENCE v. PORTER*, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167, *Cooley, Cas. Damages*, 62. See "Damages," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>137</sup> *Rexter v. Starin*, 73 N. Y. 601; *Harrison v. Missouri Pac. Ry. Co.*, 88 Mo. 625; *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa,

Courts frequently speak of the duty to make the damages as light as possible, but it is a duty only in the sense that compensation is denied for losses which might have been avoided. In *Miller v. Trustees of Mariner's Church*<sup>138</sup> the doctrine was well explained. Weston, J., said: "If the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. Thus, in a contract of assurance, where the assured may be entitled to recover for a total loss, he, or the master employed by him, becomes the agent of the assurer to save and turn to the best account such of the property assured as can be preserved. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the whole loss on the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and, if they bring less, he may recover the difference, with commissions and other expenses of resale, from the first purchaser. If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. 'Qui non prohibet, cum prohibere possit, jubet.' And he who has it in his power to prevent an injury to his neighbor, and does not exercise it, is often in a moral, if not in a legal, point of view, accountable for it. The law will not permit him to throw a loss resulting from a damage to himself upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might by common prudence have prevented. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not de-

<sup>134</sup> *Central of Georgia Ry. Co. v. Morgan*, 161 Ala. 483, 49 South.

<sup>135</sup> See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>136</sup> *Greenl. (Me.)* 51, 20 Am. Dec. 341. See, also, *Davis v. Fish*, 1 G. Greene (Iowa) 406, 48 Am. Dec. 387. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

livered. If other bricks of an equal quality, and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen and the amount of rent which might be obtained for the house if it had been built. The party who is not chargeable with a violation of his contract should do the best he can in such cases; and, for any unavoidable loss occasioned by the failure of the other, he is justly entitled to a liberal and complete indemnity." Compensation for the reasonable expense and labor of an attempt to reduce the damage is chargeable to the person liable for the wrong.<sup>139</sup>

It does not affect the right of recovery that the effort proved abortive.<sup>140</sup> If the effort is successful, the wrongdoer receives the benefit of it, and it is but just that he should bear the expense. He cannot impose the expense upon the other party merely because the effort to save him from loss

<sup>139</sup> *Benson v. Malden & Melrose Gaslight Co.*, 6 Allen (Mass.) 149; *Bennett v. Lockwood*, 20 Wend. (N. Y.) 223, 32 Am. Dec. 532; *Griffith v. Blockwater Boom & Lumber Co.*, 55 W. Va. 604, 48 S. E. 442, 69 L. R. A. 124; *Kimball Bros. Co. v. Citizens' Gas & Electric Co.*, 141 Iowa, 632, 118 N. W. 891; *Hart v. Charlotte, C. & A. R. Co.*, 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794; *Mitchell v. Burch*, 36 Ind. 529; *Gillett v. Western R. Corp.*, 8 Allen (Mass.) 560. See "*Damages*," *Dec. Dig. (Key No.)* §§ 44, 45; *Cent. Dig.* §§ 90-98.

<sup>140</sup> *ELLIS v. HILTON*, 78 Mich. 150, 48 N. W. 1048, 6 L. R. A. 454, 18 Am. St. Rep. 438, *Cooley, Cas. Damages*, 67, holding that where a horse is injured and rendered entirely worthless, money expended in good faith and reasonable diligence, in an effort to effect a cure, may be recovered, in addition to the value of the horse. See, also, *Eastman v. Sanborn*, 3 Allen (Mass.) 594, 81 Am. Dec. 677. Where plaintiff incurs a new injury while reasonably endeavoring to avoid the consequences of defendant's wrong, defendant is liable for such new injuries. *Jones v. Boyce*, 1 Starkie, 493. Where a passenger on a stagecoach is placed in sudden danger, and, in the exercise of reasonable prudence, leaps therefrom, he may recover for injuries caused by the leap, although, had he retained his seat, he would have escaped uninjured. *Ingalls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346. See, also, *Wilson v. Newport Dock Co.*, 4 Hurl. & C. 232. See "*Damages*," *Dec. Dig. (Key No.)* §§ 44, 45; *Cent. Dig.* §§ 90-98.

happened to be unsuccessful. It is, of course, a condition of the allowance of expense incurred in the effort to minimize the damages that it should be undertaken with a reasonable prospect of success and that it should be prudently and economically incurred.<sup>141</sup> The expense incurred must be reasonable. The person injured need not incur unreasonable expenses, and if he does they cannot be recovered.<sup>142</sup>

### *The Rule Applied—Illustrations*

For breach of a contract of sale, the vendee can recover only what it would cost with reasonable diligence to procure the goods from the market or elsewhere.<sup>143</sup> And he is not excused from this obligation to minimize the loss by the fact that the goods can be procured only from the delinquent seller.<sup>144</sup> But if he has paid for the goods he is not obliged

<sup>141</sup> *Sullivan v. City of Anderson*, 81 S. C. 478, 62 S. E. 862. See "Damages," *Dec. Dig. (Key No.)* §§ 44, 45; *Cent. Dig.* §§ 90-98.

<sup>142</sup> *Ward's Cent. & P. Lake Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544; *Garvin v. Gates*, 73 Wis. 513, 41 N. W. 621; *Sullivan v. City of Anderson*, 81 S. C. 478, 62 S. E. 862. A passenger delayed through the fault of a railroad company cannot recover the expense of a special train hired by him to reach his destination, where there was no occasion for his presence there at any particular time. *Le Blanche v. Railroad Co.*, 1 C. P. Div. 286. Where the expense of repairing a damaged machine would have equaled the price of a new machine, the rule has no application. *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co.*, 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725. See "Damages," *Dec. Dig. (Key No.)* §§ 44, 45; *Cent. Dig.* §§ 89-99.

<sup>143</sup> *Parsons v. Sutton*, 66 N. Y. 92; *McHose v. Fulmer*, 73 Pa. 365; *Gainesford v. Carroll*, 2 Barn. & C. 624; *Barrow v. Arnaud*, 8 Q. B. 604; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Benton v. Fay*, 64 Ill. 417; *Beymer v. McBride*, 37 Iowa, 114; *Grand Tower Min. Mfg. & Transp. Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71. See "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>144</sup> *LAWRENCE v. PORTER*, 63 Fed. 62, 11 C. C. A. 27, 20 L. R. A. 167, *Cooley, Cas. Damages*, 62, where the seller refused to deliver lumber on 90 days credit under the contract, but offered to deliver for cash at a reduction of 50 cents per 1,000 feet from the contract price. See "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.



to go into the market and buy elsewhere.<sup>145</sup>

Where goods are tendered after the time fixed for delivery, compensation for damages subsequently accruing cannot be recovered. One cannot refuse to take goods, and then claim damages because he could not get them.<sup>146</sup> A vendee need not accept goods tendered at a higher price than the contract price, nor less than the subsequent market value, as such acceptance would constitute an abandonment of the original contract.<sup>147</sup> If, however, the seller in a contract for the sale of goods on credit refuses to deliver, but offers the goods at a reduced price for cash, the buyer should take advantage of the opportunity to minimize the loss, as his acceptance of the goods on the new terms is not an abandonment of his rights under the original contract.<sup>148</sup> The rule applies also in an action against a carrier for nondelivery, where the consignee can protect himself against loss by a purchase in the market.<sup>149</sup>

The applications of the rule are many and varied. Where there is a claim of damages for negligence in presenting a draft for acceptance, the indorsee must avail himself of an opportunity to realize a portion of the draft from the property of the drawer.<sup>150</sup> On the breach of a contract to lend money, the borrower must show that he was unable to obtain the

<sup>145</sup> ILLINOIS CENT. R. CO. v. COBB, 64 Ill. 128, Cooley, Cas. Damages, 65. See "Sales," Dec. Dig. (Key No.) § 418; Cent. Dig. §§ 1174-1201.

<sup>146</sup> Parsons v. Sutton, 66 N. Y. 92. See "Sales," Dec. Dig. (Key No.) § 418; Cent. Dig. §§ 1174-1201.

<sup>147</sup> Havemeyer v. Cunningham, 35 Barb. (N. Y.) 515. See "Sales," Dec. Dig. (Key No.) § 418; Cent. Dig. §§ 1174-1201.

<sup>148</sup> Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117; LAWRENCE v. PORTER, 63 Fed. 62, 11 C. C. A. 27, 20 L. R. A. 167, Cooley, Cas. Damages, 62. See "Sales," Dec. Dig. (Key No.) §§ 177, 418; Cent. Dig. §§ 1174-1201.

<sup>149</sup> Scott v. Boston & N. O. S. S. Co., 106 Mass. 468. See "Carriers," Dec. Dig. (Key No.) § 135; "Damages," Dec. Dig. (Key No.) § 62; Cent. Dig. §§ 119-132.

<sup>150</sup> Citizens' Nat. Bank of Lawrenceburg v. Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171. See "Damages," Dec. Dig. (Key No.) § 62; Cent. Dig. §§ 119-132.

money elsewhere on like terms.<sup>151</sup> Where by wrongful conduct of a watchman at a railroad station plaintiff was prevented from taking a certain train to go to his wife, who was ill, he cannot recover for anxiety suffered if he did not avail himself of the frequent subsequent trains by which he could have reached his destination.<sup>152</sup> So, too, where certain logs belonging to plaintiff were negligently set on fire, it was the duty of plaintiff, on learning of the fact, to make a reasonable effort to extinguish the fire before all the logs were destroyed.<sup>153</sup> Recovery for damage done by cattle entering plaintiff's fields through a break in the fence is limited to such damage as was done before plaintiff could, by reasonable exertion, repair the fence.<sup>154</sup>

Where an employee is wrongfully discharged before the expiration of the term of service, he must seek other employment; and the measure of damages is the difference between what he might have earned and what he should have received under his contract.<sup>155</sup> Reasonable diligence in seeking other

<sup>151</sup> *Anderson v. Hilton & Dodge Lumber Co.*, 121 Ga. 688, 49 S. E. 725. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-131.

<sup>152</sup> *St. Louis, I. M. & S. Ry. Co. v. Stroud*, 67 Ark. 112, 56 S. W. 870. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>153</sup> *Aune v. Austin-Williams Timber Co.*, 52 Wash. 356, 100 Pac. 746. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>154</sup> *Loker v. Damon*, 17 Pick. (Mass.) 284; *Watkins v. Rist*, 67 Vt. 284, 31 Atl. 413; *Ft. Smith Suburban R. Co. v. Maledon*, 78 Ark. 366, 93 S. W. 472. But compare *Cranor Smith Lumber Co. v. Frith* (Ky.) 118 S. W. 307, holding that the landowner is obliged to exercise only reasonable care to protect his crops. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>155</sup> *Walworth v. Pool*, 9 Ark. 394; *McDaniel v. Parks*, 19 Ark. 671; *Alaska Fish & Lumber Co. v. Chase*, 128 Fed. 886, 64 C. C. A. 1; *Ruland v. Waukesha Water Co.*, 52 App. Div. 280, 65 N. Y. Supp. 87; *Sutherland v. Wyer*, 67 Me. 64; *Hoyt v. Wildfire*, 2 Johns. (N. Y.) 518; *Shannon v. Comstock*, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Hendrickson v. Anderson*, 50 N. C. 246; *King v. Steiren*, 44 Pa. 99, 84 Am. Dec. 419; *Gordon v. Brewster*, 7 Wis. 355. See "*Master and Servant*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* §§ 54-56.

employment does not require one to accept employment of an entirely different or inferior sort, or to abandon one's home and place of residence.<sup>156</sup> The duty to seek other employment is confined strictly to contracts for the plaintiff's time.<sup>157</sup> It does not apply, for instance, to a contract to build a house. The fact that the contractor has contracts to build a dozen other houses will not mitigate or lessen the damages recoverable for a breach.<sup>158</sup> An employee must accept re-employment tendered by the employer who has discharged him.<sup>159</sup> But he need not accept re-employment at a less rate, as that would be a modification of the original contract, and a bar to the recovery of any damages.<sup>160</sup> Where, after notice to an employee not to go on with the work, the latter, nevertheless, completes it, he cannot recover the increased damages so caused.<sup>161</sup>

<sup>156</sup> *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Costigan v. Mohawk & H. R. R. Co.*, 2 Denio (N. Y.) 609, 43 Am. Dec. 758; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Fuchs v. Koerner*, 107 N. Y. 529, 14 N. E. 445; *Leatherberry v. Odell* (C. C.) 7 Fed. 641; *Sheffield v. Page*, 1 Spr. 285, Fed. Cas. No. 12,743. But see *Huntington v. Ogdensburg & L. C. R. Co.*, 33 How. Prac. (N. Y.) 416. And compare *Bigelow v. American Forcite Powder Mfg. Co.*, 39 Hun. (N. Y.) 599, where plaintiff was offered employment by the defendant in the same line of employment, but in another place. See "*Master and Servant*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* §§ 54-56.

<sup>157</sup> *Wolf v. Studebaker*, 65 Pa. 459; *Sullivan v. McMillan*, 37 Fla. 134, 19 South. 340, 53 Am. St. Rep. 239. See "*Master and Servant*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* §§ 54-56.

<sup>158</sup> *Sedg. El. Dam.* p. 77.

<sup>159</sup> *Bigelow v. American Forcite Powder Mfg. Co.*, 39 Hun. (N. Y.) 599. See "*Master and Servant*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* §§ 54-56.

<sup>160</sup> *Whitmarsh v. Littlefield*, 46 Hun. (N. Y.) 418; *Jackson v. Independent School Dist. of Steamboat Rock* (Iowa) 77 N. W. 860; *Chisholm v. Preferred Bankers' Life Assur. Co.*, 112 Mich. 50, 70 N. W. 415. See "*Master and Servant*," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* §§ 54-56.

<sup>161</sup> *Clark v. Marsiglia*, 1 Denio (N. Y.) 317, 43 Am. Dec. 670. See "*Master and Servant*," *Dec. Dig. (Key No.)* § 41; *Cent. Dig.* §§ 50-53; "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

Similarly in the case of personal injuries it is the duty of the person injured to use ordinary care to effect a cure and avoid enhancing the damages.<sup>162</sup> Thus it is the duty of the injured person to summon medical aid and attention if an ordinarily prudent person would do so;<sup>163</sup> but the fact that such a course was not adopted will not defeat recovery, if under all the circumstances a reasonably prudent person would not have called a physician.<sup>164</sup> If it is necessary to employ medical aid, the injured person is not obliged to employ the very highest medical skill available;<sup>165</sup> but his duty is profound if he uses reasonable care to select an ordinarily skillful physician,<sup>166</sup> and follows his directions, though the physician's treatment through mistake or error of judgment is not successful.<sup>167</sup>

<sup>162</sup> *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa, 264; *Swift & Co. v. Bleise*, 63 Neb. 739, 89 N. W. 310, 57 L. R. A. 147; *CHICAGO CITY R. CO. v. SAXBY*, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. Rep. 218, *Cooley, Cas. Damages*, 65; *St. Louis Southwestern R. Co. v. Reagan*, 79 Ark. 484, 96 S. W. 168, 7 L. R. A. (N. S.) 997. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-123.

<sup>163</sup> *Glasgow v. Metropolitan St. R. Co.*, 191 Mo. 347, 89 S. W. 915. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-123.

<sup>164</sup> *City of Galesburg v. Rahn*, 45 Ill. App. 351; *Kennedy v. Busse*, 60 Ill. App. 440. He is not bound to submit to an operation. *O'Donnell v. Rhode Island Co.*, 28 R. I. 245, 66 Atl. 578. But see *Bailey v. City of Centerville*, 108 Iowa, 20, 78 N. W. 831, where the court held that if a slight operation will give relief it is plaintiff's duty to undergo such operation. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-123.

<sup>165</sup> *CHICAGO CITY R. CO. v. SAXBY*, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 101 Am. St. Rep. 218, *Cooley, Cas. Damages*, 65. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-123.

<sup>166</sup> *Loeser v. Humphrey*, 41 Ohio St. 378, 52 Am. Rep. 86; *O'Donnell v. Rhode Island Co.*, 28 R. I. 245, 66 Atl. 578; *Hooper v. Bacon*, 101 Me. 533, 64 Atl. 950. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-123.

<sup>167</sup> *Hooper v. Bacon*, 101 Me. 533, 64 Atl. 950; *O'Donnell v. Rhode Island Co.*, 28 R. I. 245, 66 Atl. 578; *Loeser v. Humphrey*, 41 Ohio St. 378, 52 Am. Rep. 86; *Selleck v. City of Janesville*, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892; *Lyons v. Erie R. Co.*, 57 N. Y. 489. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-123.

*Rule of Contributory Negligence Distinguished*

The rule of avoidable consequences must not be confounded with that of contributory negligence, though their results are somewhat similar. Contributory negligence is a complete bar to the maintenance of the action. It defeats the right to recover any damages whatever. On the other hand, the rule of avoidable consequences presupposes a valid cause of action. It has no application until a right to recover some damages at all events has arisen, and then it operates merely to reduce the amount of recovery. It cannot entirely defeat the action.<sup>168</sup> Though plaintiff might have avoided the entire loss, yet, if an absolute right was invaded, he is entitled to nominal damages.<sup>169</sup> In cases where damages are the gist of the action, failure to avoid the damage, if it could be done by reasonable effort, would probably be regarded as contributory negligence, and a bar to the action. In actions for breach of contract, damages are never of the gist; and therefore a plea that plaintiff might have avoided all damage is no bar to the action.<sup>170</sup> Nominal damages, at least, are always recoverable for a breach of contract; and the doctrine of contributory negligence has no application.

*Limitations of Rule*

The rule of avoidable consequences requires the injured person to exercise ordinary care to avoid injurious consequences.<sup>171</sup> He need not exercise more care,<sup>172</sup> but he can-

<sup>168</sup> WESTERN REAL ESTATE TRUSTEES v. HUGHES, 172 Fed. 206, 96 C. C. A. 658, Cooley, Cas. Damages, 69. See "Damages," Dec. Dig. (Key No.) § 62; Cent. Dig. §§ 119-132; "Negligence," Dec. Dig. (Key No.) § 79, Cent. Dig. § 110.

<sup>169</sup> See ante, p. 29.

<sup>170</sup> Armfield v. Nash, 31 Miss. 361. See "Damages," Dec. Dig. (Key No.) § 62; Cent. Dig. §§ 119-132; "Negligence," Dec. Dig. (Key No.) §§ 79, 80; Cent. Dig. §§ 84, 85, 110.

<sup>171</sup> Parker v. Meadows, 86 Tenn. 181, 6 S. W. 49; Aikin v. Perry, 119 Ga. 263, 46 S. E. 93; Texas & P. Ry. Co. v. White, 101 Fed. 928, 42 C. C. A. 86, 62 L. R. A. 90; Armistead v. Shreveport & R. R. Vial R. Co., 108 La. 171, 32 South. 456. See "Damages," Dec. Dig. (Key No.) § 62; Cent. Dig. §§ 119-132.

<sup>172</sup> Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 425, 3 N. E. 389, 4 N. E. 908; Leonard v. New York, A. & B. Electro Magnetic

not recover the enhanced damages if he exercises less.<sup>173</sup> What is reasonable care is usually a question of fact to be determined in view of all the circumstances of the case.<sup>174</sup> The person injured by the wrongful conduct of another is not obliged to perform any duty imposed by contract or by law on such other.<sup>175</sup> Though the owner of cattle is bound to take such care of them as to render loss due to an overflow of the feeding yard as slight as possible, he is not bound to put them on a poor market.<sup>176</sup>

No duty to avoid consequences can arise, of course, so long as the plaintiff is ignorant that a wrong has been committed.<sup>177</sup>

Tel. Co., 41 N. Y. 544. Where a married woman became pregnant after a personal injury, which was thereby aggravated, if she had no reason to anticipate such a consequence, she may recover therefor. *Salladay v. Dodgeville*, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>173</sup> *Simpson v. City of Keokuk*, 34 Iowa, 568; *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa, 264. But see *Green v. Mann*, 11 Ill. 613; *Chase v. New York Cent. R. Co.*, 24 Barb. (N. Y.) 273. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>174</sup> As to what constitutes reasonable care under the circumstances, see, for example, *Bradley v. Denton*, 3 Wis. 557; *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 658; *Smith v. Chicago, C. & D. R. Co.*, 38 Iowa, 518. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>175</sup> *Armistead v. Shreveport & R. R. Val. R. Co.*, 108 La. 171, 32 South. 456; *Louisville N. A. & C. Ry. Co. v. Sumner*, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719. See, also, *Gulf, C. & S. F. Ry. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. 829. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>176</sup> *McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb. 523, 41 N. W. 350, 13 Am. St. Rep. 508. See "*Damages*," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>177</sup> *Bagley v. Cleveland Rolling-Mill Co.*, 22 Blatchf. 342, 21 Fed. 159; *City of Garrett v. Winterich*, 44 Ind. App. 322, 87 N. E. 161, 88 N. E. 308; *Gulf, C. & S. F. Ry. Co. v. McMannewitz*, 70 Tex. 73, 8 S. W. 66. "Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently and willfully and obstinately, or, through gross negligence, leaves it open all summer, and cattle get in, it is his own folly." *Loker v.*

Nor does the rule require impossibilities. Where, for example, plaintiffs have invested all their money in the purchase of certain corn, they cannot be required to buy other corn in the market in order to avoid a loss caused by the nondelivery of the corn purchased.<sup>178</sup> The rule does not require plaintiff to himself commit a wrong in order to avoid the consequences of defendant's wrong.<sup>179</sup> If he must violate a contract<sup>180</sup> or commit a trespass<sup>181</sup> to avoid such consequences, the rule does not apply. Neither does the rule require plaintiff to anticipate a wrong.<sup>182</sup> He is entitled to rely upon the presumption that every one will do his duty, and commit no wrong.<sup>183</sup> The rule

Damon, 17 Pick. (Mass.) 384. See "*Damages*," *Dec. Dig.* (Key No.) § 62; *Cent. Dig.* §§ 119-132.

<sup>178</sup> "It would be very unreasonable to require one who has bought and paid for an article to have the money in his pocket with which to buy a second in case of nondelivery of the first." ILLINOIS CENT. R. CO. v. COBB, 64 Ill. 128, 142, Cooley, Cas. Damages, 65. See, also, *Startup v. Cortazzi*, 2 Crompt. M. & R. 165; *Middlekauff v. Smith*, 1 Md. 329; *Wilcox v. Campbell*, 106 N. Y. 325, 12 N. E. 823; *Id.*, 35 Hun. 254. See "*Sales*," *Dec. Dig.* (Key No.) § 418; *Cent. Dig.* §§ 1174-1201; "*Damages*," *Dec. Dig.* (Key No.) § 62; *Cent. Dig.* §§ 119-132.

<sup>179</sup> *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259; *Chicago, R. I. & P. R. Co. v. Carey*, 90 Ill. 514. See "*Damages*," *Dec. Dig.* (Key No.) § 62; *Cent. Dig.* §§ 119-132.

<sup>180</sup> *Leonard v. New York A. & B. Electro Magnetic Tel. Co.*, 41 N. Y. 544, 566. See "*Damages*," *Dec. Dig.* (Key No.) § 62; *Cent. Dig.* §§ 119-132.

<sup>181</sup> *Chicago, R. I. & P. R. Co. v. Carey*, 90 Ill. 514; *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 319; *Simpson v. City of Keokuk*, 34 Iowa, 568. See "*Damages*," *Dec. Dig.* (Key No.) § 62; *Cent. Dig.* §§ 119-132.

<sup>182</sup> *Cranor Smith Lumber Co. v. Frith* (Ky.) 118 S. W. 307; *Louisville & N. R. Co. v. Sullivan Timber Co.*, 138 Ala. 379, 35 South. 327; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548; *Plummer v. Penobscot Lumbering Ass'n*, 67 Me. 367; *City of Garrett v. Winterich*, 44 Ind. App. 322, 87 N. E. 161, 88 N. E. 308. See "*Damages*," *Dec. Dig.* (Key No.) § 62; *Cent. Dig.* §§ 119-132.

<sup>183</sup> If, after there has been a breach of contract, the delinquent promises to fulfill, the fact that plaintiff has not taken steps to lessen the damage will not prevent a full recovery. *Wiley v. Fredericks*, 10 Gray (Mass.) 357; *Graves v. Glass*, 86 Iowa, 261, 53 N. W. 231. See "*Damages*," *Dec. Dig.* (Key No.) § 62; *Cent. Dig.* §§ 119-132.

only applies where a wrong or breach of contract has been actually committed.<sup>184</sup> For example, a passenger on a railroad train, who is without fault, cannot be required to pay his fare a second time, in order to avoid ejection.<sup>185</sup>

### THE REQUIRED CERTAINTY OF DAMAGES

- 31. Losses must be certain in amount, and certain in respect to the cause from which they proceed, or damages therefor cannot be recovered. The burden of proving both these facts is on the plaintiff.**

In an action for damages, the plaintiff must prove, as a part of his case, both the amount and the cause of his loss. Absolute certainty is not required, but both the cause and the probable amount of the loss must be shown with reasonable certainty.<sup>186</sup> It is not necessary that the damages should be so

<sup>184</sup> *Beers v. Board of Health*, 35 La. Ann. 1132, 48 Am. Rep. 256; *Reynolds v. Chandler River Co.*, 43 Me. 513; *Plummer v. Penobscot Lumbering Ass'n*, 67 Me. 367. A landowner need not avoid improving his property merely because he has notice of condemnation proceedings. *Driver v. Western Union R. Co.*, 32 Wis. 569, 14 Am. Rep. 726. But compare *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397, where the court intimates that plaintiff, on notice of intention of defendant to break a contract for performance of work, must not enhance the damages by continuing to work. See "Damages," *Dec. Dig. (Key No.)* § 62; *Cent. Dig.* §§ 119-132.

<sup>185</sup> *YORTON v. MILWAUKEE L. S. & W. R. CO.*, 62 Wis. 367, 21 N. W. 516, 23 N. W. 401, *Cooley, Cas. Damages*, 221. See "Carriers," *Dec. Dig. (Key No.)* §§ 358, 382; *Cent. Dig.* §§ 1434-1438, 1478-1491.

<sup>186</sup> *RICHMOND & D. R. CO. v. ALLISON*, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43, *Cooley, Cas. Damages*, 70; *East Tennessee, V. & G. R. Co. v. Staub*, 7 Lea (Tenn.) 397; *Wolcott v. Mount*, 36 N. J. Law, 262, 271, 13 Am. Rep. 438; *Allison v. Chandler*, 11 Mich. 542, 555; *Swift & Co. v. Redhead*, 147 Iowa, 94, 122 N. W. 140; *Smalling v. Jackson*, 133 App. Div. 382, 117 N. Y. Supp. 268; *Rugg v. Rohrback*, 110 Ill. App. 532; *Atchison, T. & S. F. R. Co. v. Thomas*, 70 Kan. 409, 78 Pac. 861; *Occidental*



absolutely certain as to be easy of computation.<sup>187</sup> The mere fact that it is difficult to compute the exact amount of damages does not affect the right of recovery.<sup>188</sup> Substantial damages may be recovered, though plaintiff can only state his loss proximately; but, where the evidence is so vague and uncertain that it is impossible to say that any definite amount of damage has been suffered, no damages can be recovered.<sup>189</sup> The cause of a loss already inflicted is shown with sufficient certainty when the loss is shown to be its natural and probable result.<sup>190</sup> Where the loss is pecuniary, and is present and actual, and can be measured, evidence must be given of its extent, or only nominal damages can be recovered.<sup>191</sup> The fact that pain, suffering, injury to the feelings, and the like, cannot be measured by arithmetical rule, is no reason for denying

*Consol. Min. Co. v. Comstock Tunnel Co. (C. C.)* 125 Fed. 244; *Griffin v. Calver*, 16 N. Y. 489, 69 Am. Dec. 718; *Hichborn, Mack & Co. v. Bradley*, 117 Iowa, 130, 90 N. W. 592. See "*Damages*," *Dec. Dig. (Key No.)* §§ 6, 163, 184; *Cent. Dig.* §§ 5, 454, 502.

<sup>187</sup> *Occidental Consol. Min. Co. v. Comstock Tunnel Co. (C. C.)* 125 Fed. 244. See "*Damages*," *Dec. Dig. (Key No.)* § 6; *Cent. Dig.* § 5.

<sup>188</sup> *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; *Welch v. Ware*, 32 Mich. 77; *First Nat. Bank of Minneapolis v. City of St. Cloud*, 73 Minn. 219, 75 N. W. 1054; *Swift & Co. v. Redhead*, 147 Iowa, 94, 122 N. W. 140; *Smalling v. Jackson*, 133 App. Div. 382, 117 N. Y. Supp. 268; *Iowa-Minnesota Land Co. v. Conner*, 136 Iowa, 674, 112 N. W. 820; *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 92 Pac. 442. See "*Damages*," *Dec. Dig. (Key No.)* §§ 6, 226; *Cent. Dig.* §§ 5, 568.

<sup>189</sup> *Satchwell v. Williams*, 40 Conn. 371; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. See "*Damages*," *Dec. Dig. (Key No.)* §§ 6, 163; *Cent. Dig.* §§ 5, 454-459.

<sup>190</sup> *Suth. Dam.* § 53; *Griffin v. Colver*, 16 N. Y. 494, 69 Am. Dec. 718. See "*Damages*," *Dec. Dig. (Key No.)* §§ 6, 163; *Cent. Dig.* §§ 5, 454-459.

<sup>191</sup> See ante, p. 29; *Sedg. Dam.* § 171; *Adams Express Co. v. Egbert*, 36 Pa. 360, 78 Am. Dec. 382; *Leeds v. Metropolitan Gaslight Co.*, 90 N. Y. 26; *Duke v. Missouri Pac. Ry. Co.*, 99 Mo. 347, 351, 12 S. W. 636; *Louisville Bridge Co. v. Louisville & N. R. Co.*, 116 Ky. 258, 75 S. W. 285. See "*Damages*," *Dec. Dig. (Key No.)* § 163; *Cent. Dig.* §§ 454-459.

relief.<sup>192</sup> Necessarily compensation for such injuries is left to the sound discretion of the jury.<sup>193</sup> Where compensation for actual pecuniary injury is sought, the jury have no discretion. The amount of damage must be proved, and they can award none other.<sup>194</sup> Where the loss is already inflicted, and is pecuniary, its amount may usually be proved without any uncertainty. A difficulty arises, however, where compensation is claimed for prospective losses in the nature of gains prevented; for it is impossible to prove absolutely that what might have been would have been. But absolute certainty is not required. Compensation for prospective losses may be recovered where they are such as, in the ordinary course of nature, are reasonably certain to ensue.<sup>195</sup> Reasonable cer-

<sup>192</sup> *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 South. 169. See "*Damages*," *Dec. Dig. (Key No.)* § 6; *Cent. Dig.* § 5.

<sup>193</sup> See post, p. 139.

<sup>194</sup> Damages for future pecuniary loss from a personal injury cannot be awarded where there is no evidence of plaintiff's condition in life, or earning power. *Staal v. Grand St. & N. R. Co.*, 107 N. Y. 627, 13 N. E. 624. And see *RICHMOND & D. R. CO. v. ALLISON*, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43, *Cooley, Cas. Damages*, 70. See "*Damages*," *Dec. Dig. (Key No.)* § 163; *Cent. Dig.* §§ 454-459.

<sup>195</sup> *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y. 305; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13. Compensation for loss of future support may be recovered in an action for death by wrongful act. *Lawson v. Chicago, St. P., M. & O. Ry. Co.*, 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634; *Eames v. Town of Brattleboro*, 54 Vt. 471; *Houghkirk v. President, etc., of Delaware & H. Canal Co.*, 93 N. Y. 219, 44 Am. Rep. 370; *Hoppe v. Chicago, M. & St. P. Ry. Co.*, 61 Wis. 357, 21 N. W. 227; *Johnson v. Chicago & N. W. Ry. Co.*, 64 Wis. 425, 25 N. W. 223. Compensation may be recovered for loss of earnings or income caused by personal injuries. *Moore's Adm'r v. Minerva*, 17 Tex. 20; *Wade v. Leroy*, 20 How. 34, 15 L. Ed. 813; *Pierce v. Millay*, 44 Ill. 189; *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167; *City of Chicago v. Jones*, 66 Ill. 349; *City of Chicago v. Langlass*, 66 Ill. 361; *City of Chicago v. Elzeman*, 71 Ill. 131; *Village of Sheridan v. Hibbard*, 119 Ill. 307, 9 N. E. 901; *City of Joliet v. Conway*, 119 Ill. 489, 10 N. E. 223; *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Stafford v. City of Oskaloosa*, 64 Iowa, 351, 20 N. W. 174; *Jordan v. Middlesex R. Co.*, 138 Mass. 425; *Stephens v. Hannibal & S. J. R. Co.*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; *Sheehan v. Edgar*, 58 N. Y. 631; *Pennsyl-*

faintly means reasonable probability.<sup>196</sup> Where the losses

*ania & O. Canal Co. v. Graham*, 63 Pa. 390, 3 Am. Rep. 549; *Scott Tp. v. Montgomery*, 95 Pa. 444; *Lake Shore & M. S. Ry. Co. v. Frantz*, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389; *Houston & T. C. Ry. Co. v. Boehm*, 57 Tex. 152; *Goodno v. City of Oshkosh*, 28 Wis. 300.

The labor of professional men has no fixed market value. What the injured person has earned in the past is evidence, though not conclusive, of what he might have earned. *Pennsylvania R. Co. v. Dale*, 76 Pa. 47; *Welch v. Ware*, 32 Mich. 77; *New Jersey Exp. Co. v. Nichols*, 33 N. J. Law, 434, 97 Am. Dec. 722; *Parshall v. Minneapolis & St. L. Ry. Co.*, (C. C.) 35 Fed. 649; *Nash v. Sharpe*, 19 Hun (N. Y.) 365; *Walker v. Erie Ry. Co.*, 63 Barb. (N. Y.) 260; *Luck v. City of Ripon*, 52 Wis. 196, 8 N. W. 815; *Baker v. Manhattan Ry. Co.*, 54 N. Y. Super. Ct. 394; *Phillips v. London & S. W. R. Co.*, 5 C. P. Div. 280; *City of Indianapolis v. Gaston*, 58 Ind. 224; *City of Logansport v. Justice*, 74 Ind. 378, 39 Am. Rep. 79; *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567; *Metcalf v. Baker*, 57 N. Y. 662; *McNamara v. Village of Clintonville*, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722; *Collins v. Dodge*, 37 Minn. 503, 35 N. W. 368; *City of Bloomington v. Chamberlain*, 104 Ill. 268; *Masterton v. Village of Mt. Vernon*, 58 N. Y. 391. It is immaterial that plaintiff is not legally entitled to such earnings, if he was in the customary receipt of them. *Phillips v. London & S. W. R. Co.*, 5 C. P. Div. 280; *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567; *Luck v. City of Ripon*, 52 Wis. 196, 8 N. W. 815; *McNamara v. Village of Clintonville*, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722. But loss of earnings in an illegal employment cannot be compensated. *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61, 19 Am. Rep. 483; *Kauffman v. Babcock*, 67 Tex. 241, 2 S. W. 878. Where one is learning a profession, compensation may be recovered on the basis of the probable skill he would have acquired. *Howard Oil Co. v. Davis*, 76 Tex. 630, 13 S. W. 665. Where one is not engaged in business at the time of an injury, he may recover compensation for being prevented from engaging in business in the future. *Fisher v. Jansen*, 128 Ill. 549, 21 N. E. 598. Prospective damages for defamation cannot be recovered, as the verdict heals the reputation. *Halstead v. Nelson*, 24 Hun (N. Y.) 396; *Bradley v. Cramer*, 66 Wis. 297, 28 N. W. 372. See "*Damages*," *Dec. Dig. (Key No.)* § 163; *Cent. Dig.* §§ 454-459.

<sup>196</sup> *Griswold v. New York Cent. & H. R. Co.*, 115 N. Y. 61, 21 N. E. 726, 12 Am. St. Rep. 775; *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544. See "*Damages*," *Dec. Dig. (Key No.)* §§ 22-24; *Cent. Dig.* §§ 59-68.

claimed are contingent, speculative, or merely possible, they cannot be compensated.<sup>197</sup>

### **SAME—PROFITS OR GAINS PREVENTED**

#### **32. Compensation may be recovered for profits lost when the loss is a proximate and certain result of the tort or breach of contract.**

It was at one time laid down as a general rule that damages could not be recovered for the loss of profits.<sup>198</sup> It was thought that profits were in their very nature too uncertain to be considered.<sup>199</sup> It is well established now, however, that damages may be recovered for such losses if they are proximate and certain.<sup>200</sup>

<sup>197</sup> *RICHMOND & D. R. CO. v. ALLISON*, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43, *Cooley, Cas. Damages*, 70; *SHERMAN CENTER TOWN CO. v. LEONARD*, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101, *Cooley, Cas. Damages*, 74; *Stevens v. Yale*, 113 Mich. 680, 72 N. W. 5; *De Costa v. Massachusetts Flat Water & Mining Co.*, 17 Cal. 613; *Fry v. Dubuque & S. W. Ry. Co.*, 45 Iowa, 416; *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. (N. Y.) 425; *Staal v. Grand St. & N. R. Co.*, 107 N. Y. 625, 13 N. E. 624; *Chicago City Ry. Co. v. Henry*, 62 Ill. 142; *Atchison, T. & S. F. R. Co. v. Thomas*, 70 Kan. 409, 78 Pac. 861; *Swift & Co. v. Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; *Masterton v. Mayor, etc., of City of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38. See "*Damages*," *Dec. Dig. (Key No.)* §§ 22-24; *Cent. Dig.* §§ 59-68.

<sup>198</sup> Mr. Sedgwick calls attention to the confusion arising from the loose use of the word "profits." As used by the courts in this connection, it may mean either the wages a man could earn, the rent or value of use of property, the advantages of a contract, or the true profits of a business. Care must be taken to ascertain in which sense it is used in particular cases. *Sedg. Dam.* 250.

<sup>199</sup> See *The Lively*, 1 Gall. 315, 325, *Fed. Cas. No.* 8,403; *The Anna Maria*, 2 Wheat. 327, 4 L. Ed. 252; *The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456; *La Amistad de Rues*, 5 Wheat. 385, 5 L. Ed. 115; *Boyd v. Brown*, 17 Pick. (Mass.) 453; *Smith v. Condry*, 1 How. 28, 11 L. Ed. 35; *Minor v. The Picayune No. 2*, 13 La. Ann. 564. See "*Damages*," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

<sup>200</sup> *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Stevens v.*

In *Griffin v. Calver*,<sup>201</sup> Selden, J., said: "It is a well-established rule of the common law that damages recoverable for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should per se prevent their allowance. Profits which would certainly have been realized but for the defendant's fault are recoverable; those which are speculative and contingent are not. The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject

Yale, 113 Mich. 680, 72 N. W. 5; *Brigham v. Carlisle*, 78 Ala. 243, 249, 56 Am. Rep. 28; *Masterton v. Mayor, etc., of City of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *SHERMAN CENTER TOWN CO. v. LEONARD*, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101, Cooley, Cas. Damages, 74. Expected specific profits cannot be recovered. *Brown v. Smith*, 12 Cush. (Mass.) 366; *Aber v. Bratton*, 60 Mich. 357, 27 N. W. 564; *Callaway Min. & Mfg. Co. v. Clark*, 32 Mo. 305; *Marlow v. Lajeunesse*, 18 L. C. Jur. 188. Anticipated profits from a competition or speculation are too uncertain to be compensated. *Watson v. Ambergate, N. & B. R. Co.* 15 Jur. 448; *Western Union Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719; *Mizner v. Frazier*, 40 Mich. 592, 29 Am. Rep. 562; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. But see *Adams Exp. Co. v. Egbert*, 36 Pa. 360, 78 Am. Dec. 382, expressing contrary opinion on the abstract doctrine. Damages assessed on the basis of an approximate estimate of the maturity of building association stock are not speculative. *Manter v. Truesdale*, 57 Mo. App. 435. Damages in the nature of anticipated profits on expected or hoped-for sales are too remote. *Silurian Mineral Springs Co. v. Kuhn*, 65 Neb. 646, 91 N. W. 508; *Atchison, T. & S. F. Ry. Co. v. Thomas*, 70 Kan. 409, 78 Pac. 861; *Iron City Toolworks v. Welisch*, 128 Fed. 693, 63 C. C. A. 245. Reference may also be made to the following cases supporting the general doctrine: *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875; *Bartow v. Erie R. Co.*, 73 N. J. Law, 12, 62 Atl. 489; *Taber Lumber Co. v. O'Neal*, 160 Fed. 596, 87 C. C. A. 498; *Hoskins v. Scott*, 52 Or. 271, 96 Pac. 1112; *Hendler v. Quigley*, 38 Pa. Super. Ct. 39. See "*Damages*," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

<sup>201</sup> 16 N. Y. 489, 491, 69 Am. Dec. 718. See "*Damages*," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.” Thus, anticipated profits from the use of money cannot be recovered in an action for its nonpayment, because, non constat, instead of realizing any profits, a loss might have been sustained, owing to unforeseen circumstances, as often happens in the business world. In such cases, the average value of the use of money—i. e., interest—is the only loss that can be certainly proved, and is therefore the measure of damages.<sup>202</sup>

It is the aim and purpose of the law to give to a party injured by the breach of a contract all the damages which he may have suffered from such breach; and where the contract is made with a view to future profits, and such profits are within the contemplation of the parties, they may, when they can be established with certainty, form a just measure of damage. But the right to recover damages for anticipated profits has always been, and will continue to be, a troublesome question. No fixed rule can be laid down, which, when applied to the facts of a case involving damages for anticipated profits, will determine where a recovery may or may not be had. Each case must be determined on the facts peculiar to itself.<sup>203</sup>

Profits as an element of damages for breach of contract are not excluded because of anything inherent in their nature, but usually because they are remote and contingent, as in the case of anticipated profits from collateral engagements of the parties, or from current sales dependent on the uncertainty of trade and fluctuations of the market.<sup>204</sup> Such profits or gains are uniformly rejected as too contingent and speculative in

<sup>202</sup> *Green v. Goddard*, 9 Metc. (Mass.) 212, 232. See post, ch. V, “Interest.” See “*Damages*,” *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72–88.

<sup>203</sup> *Atchison, T. & S. F. R. Co. v. Thomas*, 70 Kan. 409, 78 Pac. 861. See “*Damages*,” *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72–88.

<sup>204</sup> *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748. See “*Damages*,” *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72–88.

their nature, and too dependent on the chances of business, to enter into a safe or reasonable estimate of damages.<sup>205</sup> But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. They are part and parcel of the contract itself, entering into and constituting a portion of its very elements, and are presumed to have been taken into consideration when the contract was made. It is true, as said in *Wakeman v. Wheeler & W. Mfg. Co.*,<sup>206</sup> that damages by way of prospective profits are nearly always involved in some uncertainty. "Usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered, because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. \* \* \* Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and, so far as they can be properly proved, they may form the measure of damage. As they are prospective, they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach."

<sup>205</sup> *Masterton v. Mayor, etc., of City of Brooklyn*, 7 Hill (N. Y.) 61, 43 Am. Dec. 38. See "Damages," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

<sup>206</sup> 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676. See "Damages," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

*The Rule Applied—Illustrations*

If one is injured so as to interrupt his earnings, he may recover compensation for his loss of time.<sup>207</sup> Where plaintiff is engaged in a mercantile business, compensation for a personal injury is limited to the value of his loss of time; loss of profits of the business through the injury to the good will not being a natural consequence.<sup>208</sup> The usual and ordinary profits of an established business are reasonably certain, and may be recovered in an action for interruption of the business, in the absence of anything showing that they would not have been realized.<sup>209</sup> Some businesses are of so uncertain a nature that their profits never become established, such as fishing.<sup>210</sup>

So, too, where plaintiff was employed by contract as a traveling salesman, his commissions depending not only on the number and amount of his sales, but also in the proportional quantity of two classes of goods sold, his commissions being different on each, the amount of his commissions depended on too many contingencies—the state of the trade, the demand

<sup>207</sup> *Lund v. Tyler*, 115 Iowa, 236, 88 N. W. 333; *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72; *Holyoke v. Grand Trunk Ry.*, 48 N. H. 541; *Wynne v. Atlantic Ave. R. Co.*, 14 Misc. Rep. 394, 35 N. Y. Supp. 1034; affirmed in 156 N. Y. 702, 51 N. E. 1094. See "Damages," *Dec. Dig. (Key No.)* §§ 37, 99; *Cent. Dig. §§ 237-241*.

<sup>208</sup> *Marks v. Long Island R. Co.*, 14 Daly (N. Y.) 61; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19; *Masterton v. Village of Mt. Vernon*, 58 N. Y. 391. See "Damages," *Dec. Dig. (Key No.)* § 37; *Cent. Dig. §§ 237-241*.

<sup>209</sup> *Allison v. Chandler*, 11 Mich. 542; *Peltz v. Eichele*, 62 Mo. 171; *Gunter v. Astor*, 4 Moore, 12; *Willer v. Oregon Ry. & Nav. Co.*, 15 Or. 153, 13 Pac. 768; *French v. Connecticut River Lumber Co.*, 145 Mass. 261, 14 N. E. 113; *STATES v. DURKIN*, 65 Kan. 101, 68 Pac. 1091, *Cooley, Cas. Damages*, 76. See, also, *Fredonia Gas Co. v. Bailey*, 77 Kan. 296, 94 Pac. 258. See "Damages," *Dec. Dig. (Key No.)* § 40; *Cent. Dig. §§ 72-88*.

<sup>210</sup> *Wright v. Mulvaney*, 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807, 23 Am. St. Rep. 393; *Willis v. Branch*, 94 N. C. 142; *Hunt v. Hoboken Land Improvement Co.*, 3 E. D. Smith (N. Y.) 144; *Jones v. Call*, 96 N. C. 337, 2 S. E. 647, 60 Am. Rep. 416. And see *Lund v. Tyler*, 115 Iowa, 236, 88 N. W. 333, where it was held that a fisherman could recover for loss of time. See "Damages," *Dec. Dig. (Key No.)* §§ 37, 40; *Cent. Dig. §§ 72-88, 237-241*.



for the goods, their suitability to the different markets, the fluctuations of business, and plaintiff's own skill, energy, and industry—to allow a recovery of anticipated profits on breach of the contract.<sup>211</sup>

Plaintiff cannot recover anticipated profits of a new business, in which he was wrongfully prevented from embarking.<sup>212</sup> Thus prospective profits to be derived from conducting a hotel in a new location cannot be recovered on breach of a contract to move the hotel to another town.<sup>213</sup> Similarly for delay in the delivery of a telegram directing plaintiff's broker to purchase oil, no purchase being made because of the delay, anticipated profits on such purchase, if it had been made, cannot be recovered.<sup>214</sup>

Only the amount paid for the publication of an advertisement in a newspaper can be recovered for its negligent omission.<sup>215</sup>

Damages for the loss of the use of land or business premises are the rental value.<sup>216</sup> But when such loss inter-

<sup>211</sup> *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28. But compare *Hichborn, Mack & Co. v. Bradley*, 117 Iowa, 130, 90 N. W. 592, where under somewhat similar circumstances future profits were regarded as in contemplation of the parties. See "*Damages*," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-78.

<sup>212</sup> *Red v. City Council of Augusta*, 25 Ga. 386; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Greene v. Williams*, 45 Ill. 206; *Hair v. Barnes*, 26 Ill. App. 580; *Morey v. Metropolitan Gaslight Co.*, 38 N. Y. Super. Ct. 185; *Bingham v. Walla Walla*, 3 Wash. T. 68, 13 Pac. 408; *Aber v. Bratton*, 60 Mich. 357, 27 N. W. 564. See "*Damages*," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

<sup>213</sup> *SHERMAN CENTER TOWN CO. v. LEONARD*, 46 Kan. 354, 26 Pac. 717, 26 Am. St. Rep. 101, *Cooley, Cas. Damages*, 74. See "*Damages*," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

<sup>214</sup> *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 64-68.

<sup>215</sup> *Eisenlohr v. Swain*, 35 Pa. 107, 78 Am. Dec. 328. See, also, *Stevens v. Yale*, 113 Mich. 680, 72 N. W. 5, where the breach consisted in failing to print plaintiff's name at the bottom of an advertisement of a toilet preparation. See "*Damages*," *Dec. Dig. (Key No.)* § 120; *Cent. Dig.* §§ 291-305.

<sup>216</sup> *City of Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626; *Baltimore & O. R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362; *Newark Coal Co. v. Upson*, 40 Ohio St. 17; *Snodgrass v. Rey-*

rupts an established business, loss of profits may also be compensated.<sup>217</sup> Thus where the owner of a mill, the efficiency of which was impaired by an unlawful increased flowage from a lower dam, had built up an established manufacturing business in connection with the mill, the business being apparently regular and permanent, with a fair and regular demand for the product at prices affording a definite profit, such profits are not speculative, but should be included in the damages awarded.<sup>218</sup>

The measure of damages for the nondelivery of or injury to machinery is the value of its use;<sup>219</sup> but expected profits from its use are too uncertain to be recovered.<sup>220</sup>

nolds, 79 Ala. 452, 58 Am. Rep. 601; *Rose v. Wynn*, 42 Ark. 257; *Robrecht v. Marling's Adm'r*, 29 W. Va. 765, 2 S. E. 827; *Hexter v. Knox*, 63 N. Y. 561; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501; *Giles v. O'Toole*, 4 Barb. (N. Y.) 261; *Fondavila v. Jourgensen*, 52 N. Y. Super. Ct. 403; *Sinker v. Kidder*, 123 Ind. 528, 24 N. E. 341; *Doods v. Hakes*, 114 N. Y. 260, 21 N. E. 398; *City of Cincinnati v. Evans*, 5 Ohio St. 594. See "*Damages*," *Dec. Dig. (Key No.)* §§ 39, 40; *Cent. Dig.* §§ 72-88, 260-284.

<sup>217</sup> See ante, note 216, and also *Ward v. Smith*, 11 Price, 19; *Hexter v. Knox*, 63 N. Y. 561; *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858; *Shaw v. Hoffman*, 25 Mich. 163; *Seyfert v. Bean*, 83 Pa. 450; *Llewellyn v. Rutherford*, L. R. 10 C. P. 456; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Schile v. Brokhahus*, 80 N. Y. 614; *Gibson v. Fischer*, 68 Iowa, 29, 25 N. W. 914; *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 813; *Pollitt v. Long*, 58 Barb. (N. Y.) 20. See "*Damages*," *Dec. Dig. (Key No.)* §§ 39, 40; *Cent. Dig.* §§ 72-88, 260-284.

<sup>218</sup> *NATIONAL FIBRE BOARD CO. v. LEWISTOWN & A. ELECTRIC LIGHT CO.*, 95 Me. 318, 49 Atl. 1095, *Cooley, Cas. Damages*, 77. See "*Damages*," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

<sup>219</sup> *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; *Griffin v. Colver*, 16 N. Y. 489, 496, 69 Am. Dec. 718. See, also, *Satchwell v. Williams*, 40 Conn. 371; *Strawn v. Cogswell*, 28 Ill. 457; *Benton v. Fay*, 64 Ill. 417; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Pittsburg Coal Co. v. Foster*, 59 Pa. 365; *Pettee v. Tennessee Mfg. Co.*, 1 Sneed (Tenn.) 381; *Hinckley v. Beckwith*, 13 Wis. 31; *Priestly v. Northern Indiana & C. R. Co.*, 26 Ill. 205, 79 Am. Dec. 369; *Middlekauff v. Smith*, 1 Md. 329. See "*Damages*," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88; "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

<sup>220</sup> *Willingham v. Hooven*, 74 Ga. 233, 58 Am. Rep. 435; *Mc-*

Loss of a reward offered for the capture of a criminal is not too remote a consequence of a failure to deliver a telegram giving information which would lead to the capture.<sup>221</sup> On the other hand, anticipated gains from a possible promotion in the railway postal service cannot form an element of damages for personal injury to a postal clerk.<sup>222</sup>

Loss of profits by the destruction of an unmatured crop is usually regarded as too uncertain to be compensated;<sup>223</sup> but compensation based on the average crop of that year has been allowed.<sup>224</sup> Loss of profits of the crop which may grow cannot be recovered for breach of warranty of the seeds.<sup>225</sup> Where an inferior crop is raised, the amount recoverable

Kinnon v. McEwan, 48 Mich. 106, 11 N. W. 828, 43 Am. Rep. 458; Allis v. McLean, 48 Mich. 428, 12 N. W. 640; Hutchinson Mfg. Co. v. Pinch, 91 Mich. 156, 51 N. W. 930, 30 Am. St. Rep. 463; Krom v. Levy, 48 N. Y. 679; Witherbee v. Meyer, 155 N. Y. 446, 50 N. E. 58; Davis v. Cincinnati, H. & D. R. Co., 1 Disn. (Ohio) 23; Pennypacker v. Jones, 106 Pa. 237; Rogers v. Bemus, 69 Pa. 432; Bridges v. Lanham, 14 Neb. 369, 15 N. W. 704, 45 Am. Rep. 121. See, also, Washington & G. R. Co. v. American Car Co., 5 App. D. C. 524; Connersville Wagon Co. v. McFarlon Carriage Co., 166 Ind. 123, 76 N. E. 294, 3 L. R. A. (N. S.) 709. See "Damages," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-78; "Carriers," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

<sup>221</sup> McPeck v. Western Union Tel. Co., 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205. See "Telegraphs and Telephones," *Dec. Dig. (Key No.)* § 67.

<sup>222</sup> RICHMOND & D. R. CO. v. ALLISON, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43, Cooley, Cas. Damages, 70. See "Damages," *Dec. Dig. (Key No.)* § 216; *Cent. Dig.* § 551.

<sup>223</sup> Greshman v. Taylor, 51 Ala. 505; Richardson v. Northrup, 66 Barb. (N. Y.) 85; Roberts v. Cole, 82 N. C. 292; Texas & St. L. R. Co. v. Young, 60 Tex. 201; McDaniel v. Crabtree, 21 Ark. 431; Sledge v. Reid, 73 N. C. 440; Jones v. George, 56 Tex. 149, 42 Am. Rep. 689. See "Damages," *Dec. Dig. (Key No.)* § 112; *Cent. Dig.* § 281.

<sup>224</sup> Payne v. Morgan's L. & T. R. & S. S. Co., 38 La. Ann. 164, 58 Am. Rep. 174; Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479. See "Damages," *Dec. Dig. (Key No.)* §§ 40, 112; *Cent. Dig.* §§ 72-88, 281-283.

<sup>225</sup> Butler v. Moore, 68 Ga. 780, 45 Am. Rep. 508; Ferris v. Comstock, 33 Conn. 513. See "Damages," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* § 74.

is the difference between its value and that of the same crop of the kind warranted.<sup>226</sup> For breach of a contract of partnership, plaintiff may recover such profits as he can prove with reasonable certainty. Evidence of past profits is admissible, but not conclusive.<sup>227</sup> Where the partnership was terminable on notice, future profits cannot be recovered.<sup>228</sup> Profits of collateral transactions are usually too remote and uncertain to be recovered for breach of contract;<sup>229</sup> but, where the profit is the thing contracted for, it may be recovered.<sup>230</sup>

The average or usual value of the use of personal property is the measure of damages for the loss of its use.<sup>231</sup>

<sup>226</sup> *Schutt v. Baker*, 9 Hun (N. Y.) 556; *Randall v. Raper*, El. Bl. & El. 84; *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438; *Passinger v. Thornburn*, 34 N. Y. 634, 90 Am. Dec. 753; *White v. Miller*, 7 Hun (N. Y.) 427; *Id.*, 71 N. Y. 118, 27 Am. Rep. 13; *Flick v. Wetherbee*, 20 Wis. 392. See *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136. Contra, *Hurley v. Buchi*, 10 Lea. (Tenn.) 346. See "Damages," *Dec. Dig. (Key No.)* §§ 40, 112; *Cent. Dig.* §§ 72-88, 281-283.

<sup>227</sup> *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *McNeill v. Reid*, 9 Bing. 68; *Gale v. Leckie*, 2 Starkie, 107; *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291; *Reiter v. Morton*, 96 Pa. 229; *Dennis v. Maxfield*, 10 Allen (Mass.) 138; *Wakeman v. Wheeler & W. Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Winslow v. Lane*, 63 Me. 161; *Barnard v. Poor*, 21 Pick. (Mass.) 378. See "Damages," *Dec. Dig. (Key No.)* §§ 176, 190; *Cent. Dig.* §§ 461-493, 513.

<sup>228</sup> *Skinner v. Tinker*, 34 Barb. (N. Y.) 333; *Ball v. Britton*, 58 Tex. 57. See "Damages," *Dec. Dig. (Key No.)* §§ 40, 120; *Cent. Dig.* §§ 72-88, 291-305.

<sup>229</sup> *Fox v. Harding*, 7 Cush. (Mass.) 516; *Smith v. Flanders*, 129 Mass. 322; *Mace v. Ramsey*, 74 N. C. 11; *Mitchell v. Cornell*, 44 N. Y. Super. Ct. 401; *Houston & T. C. R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642; *Evans v. Cincinnati, S. & M. R. Co.*, 78 Ala. 341; *Missouri, K. & T. R. Co. v. City of Ft. Scott*, 15 Kan. 435; *Shaw v. Hoffman*, 25 Mich. 162; *Watterson v. Allegheny Val. R. Co.*, 74 Pa. 208; *Frye v. Maine Cent. R. Co.*, 67 Me. 414. See "Damages," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

<sup>230</sup> *Masterson v. Mayor, etc., of City of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Lentz v. Choteau*, 42 Pa. 435. See "Damages," *Dec. Dig. (Key No.)* §§ 40, 120; *Cent. Dig.* §§ 72-88, 291-305.

<sup>231</sup> *Benton v. Fay*, 64 Ill. 417; *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 Ind. 471; *Monroe v. Lattin*, 25 Kan. 351; *Brown v.*

For the loss of personal property, the wholesale market value, and not the retail value, is the measure of damages.<sup>232</sup> "The retail value or the price at which goods are sold at retail includes the expected and contingent profits, the earning of which involves labor, loss of time, and expenses, supposes no damages to or depreciation in the value of the goods, and is dependent upon the contingency of finding purchasers for cash, and not upon credit, within a reasonable time, the sale of the entire stock without the loss by unsalable remnants, and the closing out of a stock of goods as none ever was or ever will be closed out, by sales at retail, at full prices."<sup>233</sup>

*Prospective Gains from Property Totally Destroyed*

Anticipated profits or gains from the use of property which has been totally destroyed by defendant's wrong do not fall within the rule, and cannot be recovered.<sup>234</sup> In such cases compensation is given for the whole value of the property destroyed, and thereupon, in legal contemplation, all plaintiff's title and interest in the property ceases. It is as though he had sold it. Having received full value, and parted with his title to the property, plaintiff cannot justly claim compensation for gains he might have derived from its future use.<sup>235</sup>

Hadley, 43 Kan. 267, 23 Pac. 492; Johnson v. Inhabitants of Holyoke, 105 Mass. 80; Luce v. Hoisington, 56 Vt. 436; Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807, 23 Am. St. Rep. 393; Cushing v. Seymour, Sabin & Co., 30 Minn. 301, 15 N. W. 249; Fultz v. Wycoff, 25 Ind. 321; Whitson v. Gray, 3 Head (Tenn.) 441; Brown v. Foster, 51 Pa. 165; Bohn v. Cleaver, 25 La. Ann. 419. See "Damages," *Dec. Dig. (Key No.)* §§ 39, 40; *Cent. Dig.* §§ 79-88, 260-284.

<sup>232</sup> Young v. Cureton, 87 Ala. 727, 6 South. 352. See "Damages," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

<sup>233</sup> Wehle v. Haviland, 69 N. Y. 448. But see Alabama Iron Works v. Hurley, 86 Ala. 217, 5 South. 418. See "Damages," *Dec. Dig. (Key No.)* § 40; *Cent. Dig.* §§ 72-88.

<sup>234</sup> Gossage v. Philadelphia B. & W. R. Co., 101 Md. 698, 61 Atl. 692. See "Damages," *Dec. Dig. (Key No.)* §§ 39, 40; *Cent. Dig.* §§ 72-88, 260-284.

<sup>235</sup> Sedg. Dam. § 178; McKnight v. Ratcliff, 44 Pa. 156; Erie City Iron Works v. Barber, 106 Pa. 125, 51 Am. Rep. 508; Thomas B.

## ENTIRETY OF DEMAND

33. All the damage resulting from a single cause of action must be recovered in a single action. The demand cannot be split, and separate actions maintained for the separate items of damage.

A single cause of action gives rise to but a single demand for damages. It is an entirety.<sup>236</sup> Plaintiff must demand the full amount of damages to which he is entitled in one suit, and a judgment therein is a bar to any subsequent suit on the same cause of action,<sup>237</sup> even though losses arise subsequently which could not have been foreseen or proved at the time of the former suit.<sup>238</sup> The matters complained of have become *res judicata*. The cause of action cannot be split, and separate suits maintained for the recovery of each separate item of damage.<sup>239</sup> A cause of action is the wrong

& W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co., 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725; *Edwards v. Beebe*, 48 Barb. (N. Y.) 106. See "*Damages*," *Dec. Dig. (Key No.)* §§ 39, 40, 105; *Cent. Dig.* §§ 72-88, 266-271.

<sup>236</sup> *Dennis v. Nearfield*, 10 Allen (Mass.) 138; *WICHITA & W. R. CO. v. BEEBE*, 39 Kan. 465, 18 Pac. 502, *Cooley, Cas. Damages*, 80; *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127; *King v. Chicago, M. & St. P. Ry. Co.*, 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238. But see *Eagan v. New York Transp. Co.*, 39 Misc. Rep. 111, 78 N. Y. Supp. 209. See "*Action*," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* §§ 549-633.

<sup>237</sup> *WICHITA & W. R. CO. v. BEEBE*, 39 Kan. 465, 18 Pac. 502, *Cooley, Cas. Damages*, 80; *Stodghill v. Chicago, B. & Q. R. Co.*, 53 Iowa, 341, 5 N. W. 495; *Filer v. New York Cent. R. Co.*, 49 N. Y. 42; *Howell v. Goodrich*, 69 Ill. 556; *Winslow v. Stokes*, 48 N. C. 285, 67 Am. Dec. 242. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 592-599; *Cent. Dig.* §§ 1107-1114.

<sup>238</sup> *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333; *Howell v. Goodrich*, 69 Ill. 556. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 601-606; *Cent. Dig.* §§ 1116-1120.

<sup>239</sup> *WICHITA & W. R. CO. v. BEEBE*, 39 Kan. 465, 18 Pac. 502, *Cooley, Cas. Damages*, 80; *Pierro v. St. Paul & N. P. R. Co.*, 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673. See "*Action*," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* §§ 549-623.

HALF DAM. (2D ED.)—8

complained of; that is, the conjunction of conduct and damage.<sup>240</sup> Neither alone constitutes a legal wrong. When an award of damages has been once made for a wrong, that wrong is redressed. Losses subsequently arising, without a renewal or continuance of the conduct, are *damnum absque injuria*.<sup>241</sup> On this principle, a recovery in an action for assault and battery was held to be a bar to a subsequent action for additional damages, brought upon the falling out of another piece of plaintiff's skull.<sup>242</sup> Holt, C. J., said: "Every new dropping is a nuisance, but it is not a new battery; and, in trespass, the grievousness or consequence of the battery is not the ground of the action, but the measure of damages which the jury must be supposed to have considered at the trial." And in another place he said: "If this matter had been given in evidence as that which in probability might have been the consequence of the battery, the plaintiff would have recovered damages for it. The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in aggravation of damages."

An interesting phase of the rule as to singleness of recovery arises when the wrongful act results in injury to both person and property at the same time. The general rule in such cases seems to be that there is only one cause of action, and that the damages for both the personal injury and the injury to the property must be recovered in a single action.<sup>243</sup>

<sup>240</sup> See ante, p. 9, et seq.

<sup>241</sup> *National Copper Co. v. Minnesota Minn. Co.*, 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333; *Howell v. Goodrich*, 69 Ill. 556; *Pierro v. St. Paul & N. P. R. Co.*, 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673; *Winslow v. Stokes*, 48 N. C. 285, 67 Am. Dec. 242. See "Judgment," *Dec. Dig. (Key No.)* §§ 592-599; *Cent. Dig.* §§ 1107-1114.

<sup>242</sup> *Fetter v. Beal*, 1 Ld. Raym. 339, 692, 1 Salk. 11. See "Judgment," *Dec. Dig. (Key No.)* § 598; *Cent. Dig.* § 1113.

<sup>243</sup> *Pittsburgh, C., C. & St. L. Ry. Co. v. Carlson*, 24 Ind. App. 559, 56 N. E. 251; *Bliss v. New York Cent. H. R. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; *Nokken v. Avery Mfg. Co.*, 11 N. D. 399, 92 N. W. 487; *King v. Chicago, M. & St. P. Ry. Co.*, 80 Minn. 83; 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238; *Mobile & O. R. Co. v. Matthews*, 115 Tenn. 172, 91 S. W. 194. See,

On the other hand, in New York it has been held that the causes of action are separate,<sup>244</sup> though they may be joined in one action.<sup>245</sup>

### **TIME TO WHICH COMPENSATION MAY BE RECOVERED—PAST AND FUTURE LOSSES**

34. The damages recoverable in an action include compensation not only for losses already sustained at the time of beginning the action, but also for losses which have arisen subsequently, and for prospective losses, if such losses are the certain and proximate results of the cause of action, and do not themselves constitute a new cause of action.

#### *Repetition of Wrong*

Where an action has been brought for a wrong, and the wrong is subsequently repeated, a new action must be brought to recover the damages caused thereby. Such repetition constitutes a new cause of action, and compensation for the losses caused by one wrong cannot be recovered in an action brought to recover the damages caused by another and a distinct wrong.<sup>246</sup>

also, *Chicago W. D. Ry. Co. v. Ingraham*, 131 Ill. 659, 23 N. E. 350. See "*Judgment*," *Dec. Dig. (Key No.)* § 610.

<sup>244</sup> *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176, 88 Am. St. Rep. 636. And see *Yaple v. New York, O. & W. Ry. Co.*, 57 App. Div. 265, 68 N. Y. Supp. 292. See "*Judgment*," *Dec. Dig. (Key No.)* § 610.

<sup>245</sup> *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176, 88 Am. St. Rep. 636; *Eagan v. New York Transp. Co.*, 39 Misc. Rep. 111, 78 N. Y. Supp. 209; *McInerney v. Wain*, 82 App. Div. 543, 81 N. Y. Supp. 539; *Howe v. Peekham*, 10 Barb. (N. Y.) 656. Compare *Taylor et al. v. Metropolitan El. Ry. Co.*, 52 N. Y. Super. Ct. 299. See "*Action*," *Dec. Dig. (Key No.)* § 45; *Cent. Dig.* §§ 378-448; "*Judgment*," *Dec. Dig. (Key No.)* § 406.

<sup>246</sup> In an action for slander, evidence of words spoken after commencement of suit are inadmissible. *Root v. Lowndes*, 6 Hill



case, the entire damage, both past and prospective, may be recovered in a single action, and the judgment is a bar to any subsequent action. The breach of a contract to support plaintiff for life has sometimes been regarded as a total breach, and plaintiff allowed to recover the entire value of the promised support in one action;<sup>256</sup> but, as the contract imposes a continuous duty, any breach may be regarded as a partial one only, and successive actions may be maintained.<sup>257</sup> A similar view has been taken of contracts for service.<sup>258</sup> Whether an act is a total or only a partial breach is rather a question of the law of contracts than of damages. In doubtful cases it should be left to the jury.<sup>259</sup>

### *Illustrations*

Illustrations of continuing torts are numerous. In an ac-

for the contract could not be kept alive. But, for breach of a contract to keep cattle passes in repair, prospective damages cannot be recovered. *Phelps v. New Haven & Northampton Co.*, 43 Conn. 453. See "*Damages*," *Dec. Dig. (Key No.)* §§ 28, 29; *Cent. Dig.* §§ 69, 70, 266.

<sup>256</sup> Covenants for support and maintenance during life are entire, and any breach entitles the injured party to recover entire damages as for a total breach. *Schell v. Plumb*, 55 N. Y. 592; *Dresser v. Dresser*, 35 Barb. (N. Y.) 573; *Shaffer v. Lee*, 8 Barb. (N. Y.) 412; *Trustees of Howard College v. Turner*, 71 Ala. 429, 46 Am. Rep. 326; *Wright v. Wright*, 49 Mich. 624, 14 N. W. 571; *Parker v. Russell*, 133 Mass. 74. See "*Damages*," *Dec. Dig. (Key No.)* §§ 27-29; *Cent. Dig.* §§ 69, 70, 266; "*Judgment*," *Dec. Dig. (Key No.)* § 602; *Cent. Dig.* § 1117.

<sup>257</sup> *Suth. Dam.* 256; *Fiske v. Fiske*, 20 Pick. (Mass.) 499; *Berry v. Harris*, 43 N. H. 376; *Ferguson v. Ferguson*, 2 N. Y. 360; *Turner v. Hadden*, 62 Barb. (N. Y.) 480. See "*Damages*," *Dec. Dig. (Key No.)* §§ 27-29; *Cent. Dig.* §§ 69, 70, 266; "*Judgment*," *Dec. Dig. (Key No.)* § 602; *Cent. Dig.* § 1117.

<sup>258</sup> *McMULLEN v. DICKINSON CO.*, 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511, *Cooley, Cas. Damages*, 84. See, also, *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285. See "*Damages*," *Dec. Dig. (Key No.)* §§ 27-29; *Cent. Dig.* §§ 69, 70, 266; "*Judgment*," *Dec. Dig. (Key No.)* § 602; *Cent. Dig.* § 1117.

<sup>259</sup> *Sedg. Dam.* 125; *Shaffer v. Lee*, 8 Barb. (N. Y.) 412; *Remeelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140. See "*Bonds*," *Dec. Dig. (Key No.)* § 110; *Cent. Dig.* § 119; "*Damages*," *Dec. Dig. (Key No.)* §§ 28, 29; *Cent. Dig.* §§ 69, 70.

tion for false imprisonment, damages cannot be given for a continuance of the imprisonment after the commencement of the action, for every instant of detention without just cause is an independent tort.<sup>260</sup> So, also, a nuisance gives rise to a fresh cause of action every moment it is maintained; and therefore the damages recoverable are limited to those already suffered at the commencement of the suit.<sup>261</sup> The reason and necessity of permitting successive actions in this class of cases is very clear. It is one's duty to discontinue a trespass or remove a nuisance.<sup>262</sup> The law cannot presume that defendant will continue the wrong, nor will it permit him to acquire a right to continue it, by permitting a recovery therefor in advance.<sup>263</sup> Thus, where the wrong consists in the

<sup>260</sup> *Brasfield v. Lee*, 1 Ld. Raym. 329; *Withers v. Henley*, Cro. Jac. 379. Compare *Goslin v. Corry*, 7 Mou. & G. 342. See "*Damages*," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* § 69; "*Judgment*," *Dec. Dig. (Key No.)* §§ 605, 606; *Cent. Dig.* §§ 1119, 1120.

<sup>261</sup> *Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; *Markley v. Duncan*, 1 Harp. (S. C.) 276; *Cobb v. Smith*, 38 Wis. 21; *Stadler v. Grieben*, 61 Wis. 500, 21 N. W. 629. See, also, *Pearson v. Carr*, 97 N. C. 194, 1 S. E. 916; *Dailey v. Dismal Swamp Canal Co.*, 24 N. C. 222. In an action for flowing land, damages can be recovered only for losses suffered prior to bringing suit. *Polly v. McCall*, 37 Ala. 20; *Benson v. Chicago & A. R. Co.*, 78 Mo. 504; *Nashville v. Comar*, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121. So, also, in actions for diverting water course, *Langford v. Owsley*, 2 Bibb (Ky.) 215, 4 Am. Dec. 699; *Dority v. Dunning*, 78 Me. 387, 6 Atl. 6; *Shaw v. Etheridge*, 48 N. C. 300; or for polluting it, *Sanderson v. Pennsylvania Coal Co.*, 102 Pa. 370. See "*Damages*," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* § 69; "*Judgment*," *Dec. Dig. (Key No.)* § 606; *Cent. Dig.* § 1120.

<sup>262</sup> There is a legal obligation to discontinue a trespass or remove a nuisance. *Clegg v. Dearden*, 12 Q. B. 601; *Savannah, F. & W. R. Co. v. Davis*, 25 Fla. 917, 7 South. 29; *Adams v. Hastings & D. R. Co.*, 18 Minn. 260 (Gil. 236); *Barrick v. Schifferdecker*, 48 Hun, 355, 1 N. Y. Supp. 21; *Cumberland & O. Canal Corp. v. Hitchings*, 65 Me. 140. See "*Judgment*," *Dec. Dig. (Key No.)* § 606; *Cent. Dig.* § 1120; "*Nuisance*," *Cent. Dig.* § 100.

<sup>263</sup> *Suth. Dam.* 255; *Adams v. Hastings & D. R. Co.*, 18 Minn. 260 (Gil. 236); *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609, 80

unlawful maintenance of a private structure, or an unlawful use of land, the wrong cannot be presumed to be permanent; and therefore prospective damages cannot be recovered. This principle has been applied in actions for obstructing a stream,<sup>264</sup> for obstructing ancient lights,<sup>265</sup> for filling a canal,<sup>266</sup> and for laying out a highway around plaintiff's toll gate.<sup>267</sup>

Where an injury to plaintiff's land consists of a trespass which defendant cannot remedy without committing another trespass, the wrong is not regarded as a continuing one, and damages for the entire loss must be recovered in one action.

Am. Dec. 791; *Uline v. New York Cent. & H. R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; *Savannah & O. Canal Co. v. Bourquin*, 51 Ga. 378; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. 279; *Whitmore v. Bischoff*, 5 Hun (N. Y.) 176; *Sherman v. Milwaukee, L. S. & W. R. Co.*, 40 Wis. 645; *Russell v. Brown*, 63 Me. 203; *Bowyer v. Cook*, 4 C. B. 236; *Cumberland & O. Canal Corp. v. Hitchings*, 65 Me. 140. See "Judgment," *Dec. Dig. (Key No.)* § 606; *Cent. Dig.* § 1120.

<sup>264</sup> Damages can be recovered for the unauthorized obstruction of a stream by a dam only up to the commencement of suit. *Langford v. Owsley*, 2 Bibb (Ky.) 215, 4 Am. Dec. 6999; *Williams v. Camden & R. Water Co.*, 79 Me. 543, 11 Atl. 600; *Van Hoozier v. Hannibal & St. J. R. Co.*, 70 Mo. 145; *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474; *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42; *BOWERS v. MISSISSIPPI & R. R. BOOM CO.*, 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395, *Cooley, Cas. Damages*, 91. See "Damages," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* § 69; "Judgment," *Dec. Dig. (Key No.)* § 606; *Cent. Dig.* § 1120.

<sup>265</sup> *Blunt v. McCormick*, 3 Denio (N. Y.) 283. See, also, *Union Trust Co. of New York v. Cuppy*, 26 Kan. 754; *Spilman v. Roanoke Nav. Co.*, 74 N. C. 675; *Winchester v. Stevens Point*, 58 Wis. 350, 17 N. W. 3, 547; *Moore v. Hall*, 3 Q. B. Div. 178. See "Damages," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* § 69; "Judgment," *Dec. Dig. (Key No.)* § 606; *Cent. Dig.* § 1120; "Nuisance," *Cent. Dig.* § 100.

<sup>266</sup> *Cumberland & O. Canal Corp. v. Hitchings*, 65 Me. 140. See "Damages," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* § 69; "Judgment," *Dec. Dig. (Key No.)* § 606; *Cent. Dig.* § 1120; "Nuisance," *Cent. Dig.* § 100.

<sup>267</sup> *Cheshire Turnpike v. Stevens*, 13 N. H. 28. See "Damages," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* § 69; "Judgment," *Dec. Dig. (Key No.)* § 606; *Cent. Dig.* § 1120; "Nuisance," *Cent. Dig.* § 100.

Making an excavation<sup>268</sup> or embankment<sup>269</sup> on plaintiff's land, or filling up his pond,<sup>270</sup> are instances where this rule has been properly applied.<sup>271</sup> In these cases there is continuing damage, but no continuing conduct. The trespass—the wrong—was completed once for all.

#### *Damage Caused by Permanent Structures*

Where permanent structures have been erected which result in injury to land, there is much confusion and conflict in the authorities as to whether all the damages, past and prospective must be recovered in a single suit, or whether successive actions may be brought to recover compensation for the damage as it arises. The confusion seems to be largely due to the tendency of some of the courts to lay unnecessary stress on the character of the structure causing the injury rather than the nature of the injury itself. It is impossible to reconcile all of the cases. One line of decisions hold that where permanent structures are erected, resulting in injury to lands, all damages may be recovered in a single suit. Thus, it was said in an Iowa case:<sup>272</sup> "Where a nuisance is of such

<sup>268</sup> KANSAS P. RY. CO. v. MIHLMAN, 17 Kan. 224, Cooley, Cas. Damages, 88; Clegg v. Dearden, 12 Q. B. 576. See "Damages," Dec. Dig. (Key No.) § 27; Cent. Dig. § 69; "Judgment," Dec. Dig. (Key No.) § 606; Cent. Dig. § 1120; "Nuisance," Cent. Dig. § 100.

<sup>269</sup> Ziebarth v. Nye, 43 Minn. 541, 44 N. W. 1027. See "Damages," Dec. Dig. (Key No.) § 27; Cent. Dig. § 69; "Judgment," Dec. Dig. (Key No.) § 606; Cent. Dig. § 1120; "Nuisance," Cent. Dig. § 100.

<sup>270</sup> Finley v. Hershey, 41 Iowa, 389. See "Damages," Dec. Dig. (Key No.) § 27; Cent. Dig. § 69; "Judgment," Dec. Dig. (Key No.) § 606; Cent. Dig. § 1120; "Nuisance," Cent. Dig. § 100.

<sup>271</sup> Where defendant flooded plaintiff's mine by breaking through into it, the entire damage must be recovered in one action. National Copper Co. v. Minnesota Min. Co., 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333; Lord v. Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812. See "Damages," Dec. Dig. (Key No.) § 27; Cent. Dig. § 69; "Judgment," Dec. Dig. (Key No.) § 606; Cent. Dig. § 1120; "Nuisance," Cent. Dig. § 100.

<sup>272</sup> Stodghill v. Chicago, B. & Q. R. Co., 53 Iowa, 341, 5 N. W. 495. See, also, Van Orsdol v. Burlington, C. R. & N. R. Co., 18 Iowa, 470, 9 N. W. 379. See "Action," Dec. Dig. (Key No.) § 53; Cent. Dig. §§ 549-623; "Judgment," Dec. Dig. (Key No.) §§ 601-612; Cent. Dig. §§ 1107-1124.

a character that its continuance is necessarily an injury, and when it is of a permanent character, that will continue without change from any cause but human labor, the damage is original, and may be at once fully estimated and compensated." So, it has been held that compensation for the entire loss, both past and prospective, caused by a railroad embankment, must be recovered in one suit.<sup>273</sup> But even in such cases the ordinary rule has been applied in some states, and damages are recoverable only to the commencement of the action.<sup>274</sup>

A comparison of the decisions and a consideration of the reasons underlying them will throw some light on the distinctions which have been drawn in some cases—distinctions based no less on the character of the injury than on the nature of the structure causing the injury. If the structure is expressly authorized, there is no liability for the damage necessarily resulting. If it is authorized on condition that compensation be made for the resulting damage (a condition commonly imposed by the authorizing act or the constitution),

<sup>273</sup> *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225. See, also, *Fowle v. New Haven & N. Co.*, 112 Mass. 334, 17 Am. Rep. 106; *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Adams v. Hastings & D. R. Co.*, 18 Minn. 260 (Gil. 236). See "Action," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* §§ 549-623; "Judgment," *Dec. Dig. (Key No.)* §§ 601-612; *Cent. Dig.* §§ 1107-1124.

<sup>274</sup> *Uline v. New York Cent. & H. R. R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; *Duryea v. Mayor, etc., of City of New York*, 26 Hun (N. Y.) 120; *Blunt v. McCormick*, 3 Denio (N. Y.) 283; *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 630, and notes; *Reed v. State*, 108 N. Y. 407, 15 N. E. 735; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Ottenot v. New York, L. & W. Ry. Co.*, 119 N. Y. 603, 23 N. E. 169; *Barrick v. Schifferdecker*, 123 N. Y. 52, 25 N. E. 365; *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608; *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Cobb v. Smith*, 38 Wis. 21; *Delaware & R. Canal Co. v. Wright*, 21 N. J. Law, 469; *Wells v. New Haven & Northampton Co.*, 151 Mass. 46, 23 N. E. 724, 21 Am. St. Rep. 423; *Cooper v. Randall*, 59 Ill. 317; *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390, 34 Am. St. Rep. 92. See "Action," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* §§ 549-623; "Judgment," *Dec. Dig. (Key No.)* §§ 601-612; *Cent. Dig.* §§ 1107-1124.

and it is permanent in its nature, its continuance may reasonably be presumed, and full compensation for both past and prospective losses may be recovered in one action.<sup>275</sup> It is on this principle that the railroad embankment cases, and other like cases, are to be sustained. Of course, if an authorized permanent work is done negligently, and the negligence results in a continuing injury, it cannot be presumed that the negligence will continue, but, rather, that it will be remedied; and compensation can therefore be recovered only to the commencement of the action, and subsequent actions must be brought for damages subsequently accruing.<sup>276</sup>

Where the erection of the structure was a forbidden act, that is, where it was a trespass, and the act of trespass is completed once for all, the entire damage, past and pro-

<sup>275</sup> *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; *De Geofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524; *Peck v. City of Michigan City*, 149 Ind. 670, 49 N. E. 800; *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush (Ky.) 667. But see *Uline v. New York Cent. & H. R. R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; *Pond v. Metropolitan El. Ry. Co.*, 112 N. Y. 186, 19 N. E. 487, 8 Am. St. Rep. 734, and cases cited in preceding note. Cf. *Cadle v. Muscatine Western R. Co.*, 44 Iowa, 11. See "*Judgment*," *Dec. Dig. (Key No.)* § 606; *Cent. Dig.* § 1120; "*Nuisance*," *Cent. Dig.* § 100.

<sup>276</sup> *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608; *Kelly v. Pittsburg, C. C. & St. L. R. Co.*, 28 Ind. App. 457, 63 N. E. 233, 91 Am. St. Rep. 134; *St. Louis, I. M. & S. R. Co. v. Stephens*, 72 Ark. 127, 78 S. W. 766; *City of Eufaula v. Simmons*, 86 Ala. 515, 6 South. 47; *Reed v. State*, 108 N. Y. 407, 15 N. E. 735; *Duryea v. Mayo, etc., of City of New York*, 26 Hun, 120; *Peck v. City of Michigan City*, 149 Ind. 670, 49 N. E. 800; *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390, 34 Am. St. Rep. 92; *Chicago, B. & Q. R. Co. v. Mitchell*, 74 Neb. 563, 104 N. W. 1144; *Powers v. City of Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, relied on in *Stodghill v. Chicago, B. & Q. R. Co.*, 53 Iowa, 341, 5 N. W. 495, cannot be sustained. In this case the construction of the ditch by the city was an authorized act, but it was done negligently. See "*Action*," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* §§ 549-623.

spective, must be recovered in one suit.<sup>277</sup> Continuing damage does not make a continuing trespass. There must be continuing conduct as well. Thus, where a trespasser digs a ditch or erects an embankment on another's land, and leaves it, the continued existence of the ditch or the embankment does not make the wrong a continuing trespass.<sup>278</sup> It constitutes merely a continuing damage. The trespass was complete when the trespasser left the premises. Consequently, the entire damages, past and prospective, must be recovered in one action. The trespasser is not guilty of continuing a trespass or maintaining a nuisance because he is under no duty to remedy it. He could not do so without committing a new trespass.

It is sometimes stated that "if a man throws a heap of stones or builds a wall or plants posts or rails on his neighbor's land, and there leaves them, an action will lie against him for the trespass, and the right to sue will continue from day to day until the incumbrance is removed."<sup>279</sup> This is essentially not true. The wrongful conduct was complete when the stones or wall were placed on the other's land and

<sup>277</sup> *Adams v. Hastings & D. R. Co.*, 18 Minn. 260 (Gil. 236); *KANSAS PAC. RY. v. MIHLMAN*, 17 Kan. 224, Cooley, Cas. Damages, 88. See "Action," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* §§ 549-592; "Judgment," *Dec. Dig. (Key No.)* §§ 598, 606; *Cent. Dig.* §§ 1113, 1120; "Nuisance," *Cent. Dig.* § 100.

<sup>278</sup> *KANSAS PAC. RY. CO. v. MIHLMAN*, 17 Kan. 224, Cooley, Cas. Damages, 88; *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027. See "Action," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* §§ 549-592; "Judgment," *Dec. Dig. (Key No.)* §§ 598, 606; *Cent. Dig.* §§ 1113, 1120; "Nuisance," *Cent. Dig.* § 100.

<sup>279</sup> 1 Add. Torts, 332. See, also, *Russell v. Brown*, 63 Me. 203. In *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333, Cooley, J., draws a distinction between leaving a hole on another's premises, and leaving houses or other obstructions there; saying that physical hindrances are a continuance of the original force, and therefore are continuing trespasses, but that a hole is only the consequence of a wrongful force which ceased to operate the moment it was made. The distinction is unsound. See *KANSAS PAC. RY. CO. v. MIHLMAN*, 17 Kan. 224, 233, Cooley, Cas. Damages, 88, per Brewer, J. See "Judgment," *Dec. Dig. (Key No.)* §§ 598, 606; *Cent. Dig.* §§ 1113, 1120.

the trespasser had departed. He could not then remove them without committing a new trespass. The tort is completed, but the damage is continuing. The law is not so absurd as to hold one liable for continuing what it forbids him to discontinue. But where the trespasser remains in possession and control, or maintains or uses the structure erected by him, then we have a continuing trespass, because there is continuing conduct. Successive actions may therefore be maintained from day to day so long as such trespass is continued. Thus, railroad companies which, by trespass, had entered upon the lands of individuals, and begun the construction and operation of railroads, were held liable as trespassers from day to day so long as the operation of the road was continued.<sup>280</sup> Staying and continuing in a house is a divisible trespass in point of time. There is a fresh trespass on each day.<sup>281</sup> Judge Cooley pronounced the principle of these decisions not open to criticism. "In each of them there was an original wrong, but there was also a persistency in the wrong from day to day. The plaintiff's possession was continually invaded, and his right to the exclusive occupation and enjoyment of his freehold continually encroached upon and limited. Each day, therefore, the plaintiff suffered a new wrong, but no single suit could be made to embrace prospective damages, for the reason that future persistency in the wrong could not legally be assumed."<sup>282</sup>

<sup>280</sup> *Adams v. Hastings & D. R. Co.*, 18 Minn. 260 (Gil. 236); *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 598, 606; *Cent. Dig.* §§ 1113, 1120.

<sup>281</sup> Per Parke, B., in *Loweth v. Smith*, 12 Mees. & W. 582. Where a turnpike company had placed buttresses on the plaintiff's land for the support of its road, it was held that a recovery of damages for the trespass did not bar a subsequent action for the continuance of the buttresses. "The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass." *Holmes v. Wilson*, 10 Adol. & E. 503. Brewer, J., said that it was very doubtful whether this ruling could be sustained upon principle. *KANSAS PAC. RY. CO. v. MIHLMAN*, 17 Kan. 224, Cooley, Cas. Damages, 88. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 598, 606; *Cent. Dig.* §§ 1113, 1120.

<sup>282</sup> *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333.



Where the erection of the structure was neither authorized nor forbidden, but it is wrongful, because it results in injury to plaintiff's land—that is, where it is a nuisance—though the structure is permanent in its nature, and “will continue without change from any cause but human labor,” and its continuance may be presumed, the damages cannot be estimated beyond the date of bringing the action, because, in the case of an ordinary nuisance, the cause of action is not so much the act of the defendant as the damage resulting from his act, and hence the cause of action does not arise until such consequences occur.<sup>283</sup> Thus, it was held in an action by a tenant against his landlord to recover damages because of the latter's erection of buildings adjoining the demised premises, which shut out the light from the tenant's doors and windows, that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term.<sup>284</sup> So, where a railroad company constructed a culvert

<sup>283</sup> *BOWERS v. MISSISSIPPI & R. R. BOOM CO.*, 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395, Cooley, Cas. Damages, 91; *City Council of Augusta v. Lombard*, 101 Ga. 724, 28 S. E. 994; *Phelps v. City of Detroit*, 120 Mich. 447, 79 N. W. 640; *Eells v. Chesapeake & O. Ry. Co.*, 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787; *HENRY v. OHIO RIVER R. CO.*, 40 W. Va. 234, 21 S. E. 863, Cooley, Cas. Damages, 98; *Aldworth v. City of Lynn*, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608; *HARVEY v. MASON CITY & FT. D. R. CO.*, 129 Iowa, 465, 105 N. W. 958, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483, Cooley, Cas. Damages, 94. In *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765, it was said by counsel, arguendo: “The distinction which pervades the cases is this: Where the plaintiff complains of a trespass, the statute runs from the time when the act of trespass was committed, except in the case of a continuing trespass. But where the cause of action is not in itself a trespass, as an act done upon a man's own land, and the cause of action is the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is sustained.” Approved by Cooley, J., in *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333. See “Action,” *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* §§ 549–592; “Judgment,” *Dec. Dig. (Key No.)* §§ 598, 606; *Cent. Dig.* §§ 1113, 1120.

<sup>284</sup> *Blunt v. McCormick*, 3 Denio (N. Y.) 283. See “Judgment,” *Dec. Dig. (Key No.)* §§ 598, 606; *Cent. Dig.* §§ 1113, 1120; “Trespass,” *Dec. Dig. (Key No.)* § 51; *Cent. Dig.* § 135.

under its embankment, which damaged land by discharging water upon it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and trespasses.<sup>285</sup>

The question of damages where the injury is caused by a permanent structure recently received careful consideration by the supreme court of Iowa in *Harvey v. Mason City & Ft. D. R. Co.*<sup>286</sup> After a careful examination of the cases the court arrived at the conclusion that whether, in the case of a permanent structure causing injury, the damages must be recovered in one action depended, not wholly on the character of the structure as permanent, but also on the nature of the injury as permanent and complete or recurrent. Whenever the structure is of a permanent character, and its construction and continuance are necessarily an injury complete and permanent at the time, the damage is original and must be compensated once for all. But if the structure is permanent in character, and its construction and continuance is not necessarily injurious, but may or may not be, the injury not being complete and permanent, but recurrent according to circumstances, the damage is to be compensated only up to the time of bringing the action, and there may be as many successive recoveries as there are successive injuries.<sup>287</sup>

<sup>285</sup> *Wells v. New Haven & Northampton Co.*, 151 Mass. 46, 23 N. E. 724, 21 Am. St. Rep. 423; *HARVEY v. MASON CITY & FT. D. R. CO.*, 129 Iowa, 465, 105 N. W. 958, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483, Cooley, Cas. Damages, 94. See, also, *Uline v. New York Cent. & H. R. R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; *St. Louis, I. M. & S. R. Co. v. Stephens*, 72 Ark. 127, 78 S. W. 766; *Kelly v. Pittsburgh, C., C. & St. L. Ry. Co.*, 28 Ind. App. 457, 63 N. E. 233, 91 Am. St. Rep. 134. Cf. *Fowle v. New Haven & Northampton Co.*, 112 Mass. 334, 17 Am. Rep. 106. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 598, 606; *Cent. Dig.* §§ 1113, 1120.

<sup>286</sup> *HARVEY v. MASON CITY & FT. D. R. CO.*, 129 Iowa, 465, 105 N. W. 958, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483, Cooley, Cas. Damages, 94. See "*Judgment*," *Dec. Dig. (Key No.)* §§ 598, 606; *Cent. Dig.* §§ 1113, 1120.

<sup>287</sup> *HARVEY v. MASON CITY & FT. D. R. CO.*, 129 Iowa, 465, 105 N. W. 958, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483, Cooley, Cas. Damages, 94; *HENRY v. OHIO RIVER R. CO.*, 40 W. Va. 234, 21 S. E. 863, Cooley, Cas. Damages, 98; *City*

It is true that all the cases are not consistent with these conclusions, but there is ample authority to sustain them, and it is submitted that they are sound in principle.

### **ELEMENTS OF COMPENSATION**

**35. Damage in respect to anything in the enjoyment of which one is protected by law may be a subject for compensation.**

**36. Damage for which the law affords compensation may be divided into three classes:**

- (a) Pecuniary losses, direct and indirect.**
- (b) Physical pain and inconvenience.**
- (c) Mental suffering.**

It has been seen that the law awards damages only for injuries to person, property, or reputation. An injury in any one of these respects may affect one in one or more of three ways. It may cause (1) pecuniary loss, direct or indirect; (2) physical pain and inconvenience; and (3) mental suffering. All three are proper elements of compensation to be considered in estimating damages. Compensation is necessarily awarded in money, and it will be observed that but one of the elements of damage is pecuniary. Breaches of contract and interference with property rights, where the sole question is as to the value of the property involved, may result solely in pecuniary damage. Damage is said to be pecuniary either when money itself is lost, or the damage is such as can be, and usually is measured by a pecuniary standard.<sup>288</sup> But where the injury is to the person, and in some classes of con-

*Council of Augusta v. Lombard*, 101 Ga. 724, 28 S. E. 994; *Eells v. Chesapeake & O. Ry. Co.*, 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787; *De Geofroy v. Merchants' Bridge Terminal R. Co.*, 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524; *Peck v. City of Michigan City*, 149 Ind. 670, 49 N. E. 800; *Dovan v. City of Seattle*, 24 Wash. 182, 64 Pac. 230, 54 L. R. A. 532, 85 Am. St. Rep. 948. See "*Judgment*," *Dec. Dig.* (Key No.) §§ 598, 606; *Cent. Dig.* §§ 1113, 1120.

<sup>288</sup> Sedg. Dam. p. 95.

tracts, the damage will be, in part at least, nonpecuniary. Thus, a physical injury may result in pecuniary loss from diminished earning power, and also in physical and mental suffering. Physical and mental suffering are nonpecuniary, though none the less actual, elements of injury, and must be compensated in money, though there is no pecuniary standard by which they may be measured. The extent of compensation for such injuries is for the jury.

### **SAME—PECUNIARY LOSSES**

**37. Compensation may be recovered for all pecuniary losses which are the proximate and certain result of the cause of action, except—**

**EXCEPTION—Counsel fees incurred in litigation caused by the wrong are usually not recoverable.**

Generally speaking, pecuniary losses are always an element in estimating the damages caused by a wrong. Indeed, in the great majority of cases it is the most important one. Pecuniary losses are sustained whenever property is destroyed, taken, detained, or damaged, when the profits of a contract are lost, earnings are prevented, earning capacity diminished, or expenses are incurred by reason of the wrong. Other forms of pecuniary loss may occur to the mind. As a general rule, compensation is always recoverable for such losses when they are the proximate and certain result of an actionable wrong.

In the case of the destruction, taking, detention, or injury of property, the damages are usually based on considerations of value of the property<sup>289</sup> and interest thereon.<sup>290</sup> So, too, in cases of breach of contract the damages may be based on similar considerations and on the loss of profits.<sup>291</sup> These

<sup>289</sup> See post, chapter VI.  
<sup>290</sup> See ante, p. 103.

<sup>291</sup> See post, chapter V.

particular kinds of pecuniary losses have been discussed elsewhere. It remains to call attention to some of the other forms of pecuniary loss, some which may have been touched upon but only incidentally.

#### *Loss of Earnings or Services*

One of the commonest forms of pecuniary loss attending on or resulting from an injury to the person is the loss of earnings or services. In accordance with the general theory of damages—that full compensation must be given when possible—it is the general rule that in cases of personal injury loss of earnings must be compensated. Therefore it is held that the person injured may recover, as one of the elements of compensation, for the loss of time and wages, if such loss is the direct, proximate, and natural result of the injury.<sup>292</sup> So, too, where one has a right of recovery for personal injuries to another, as a parent for injury to a child, or a husband for injury to a wife, the loss of the services of such child or wife is an element of compensation.<sup>293</sup>

#### *Impairment of Earning Capacity*

Another form of pecuniary loss which may result from a personal injury is the impairment of the earning capacity of

<sup>292</sup> *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72; *Karczewski v. Wilmington City R. Co.*, 4 Pennewill (Del.) 24, 54 Atl. 746; *Lund v. Tyler*, 115 Iowa, 236, 88 N. W. 333; *Joslin v. Grand Rapids Ice & Coal Co.*, 53 Mich. 322, 19 N. W. 17; *Glenn v. Philadelphia & W. C. Traction Co.*, 206 Pa. 135, 55 Atl. 860; *GOODHART v. PENNSYLVANIA R. CO.*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705, *Cooley, Cas. Damages*, 102; *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 9 South. 303, 30 Am. St. Rep. 28; *Chicago & E. R. Co. v. Meech*, 59 Ill. App. 69; *Sanford v. Inhabitants of Augusta*, 32 Me. 536; *Wynne v. Atlantic Ave. R. Co.*, 14 Misc. Rep. 394, 35 N. Y. Supp. 1034, affirmed 156 N. Y. 702, 51 N. E. 1094; *Nones v. Northhouse*, 46 Vt. 587; *City of Ripan v. Bittel*, 30 Wis. 614. See "*Damages*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 237-241.

<sup>293</sup> *Loss of services of child. Traver v. Eighth Ave. R. Co.*, \*42 N. Y. 497; *Id.*, 6 Abb. Prac. (N. S.) 46. *Loss of services of wife. Citizens' St. Ry. Co. v. Twiname*, 121 Ind. 375, 23 N. E. 129, 7 L. R. A. 352; *Hawkins v. Front St. Cable Ry. Co.*, 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72. See "*Damages*," *Dec. Dig. (Key No.)* §§ 37, 99; *Cent. Dig.* §§ 237-241.

the person injured. Such a loss, if the direct, natural, and proximate result of the injury, becomes, therefore, an element of compensation.<sup>294</sup>

### *Expenses Incurred*

Another element of compensation in the nature of a pecuniary loss is a necessary expense incurred by reason of the wrong. Thus recovery may be had for expenses incurred and rendered useless by reason of breach of a contract,<sup>295</sup> expenses incurred by reason of injury to property,<sup>296</sup> or to the person,<sup>297</sup> either directly or for the purpose of avoiding the

<sup>294</sup> Delaware, L. & W. R. Co. v. Devore, 114 Fed. 155, 52 C. C. A. 77; Linlon Coal & Mining Co. v. Persons, 11 Ind. App. 264, 39 N. E. 214; Fort Worth & D. C. Ry. Co. v. Robertson (Tex.) 18 S. W. 1093, 14 L. R. A. 781; Schmitz v. St. Louis, I. M. & S. Ry. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Norfolk & P. R. Co. v. Ornsby, 27 Grat. (Va.) 455; Louisville, N. A. & C. Ry. Co. v. Falvry, 104 Ind. 409, 3 N. E. 389; RICHMOND & D. R. CO. v. ALLISON, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43, Cooley, Cas. Damages, 70. See, also, Richmond Gas Co. v. Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683, where it is said that, if the condition of the injured person is such that a shortening of life may be apprehended, this fact may be considered in determining the extent of the injury and the consequent disability to make a living, though shortening of life as such would not be an element of compensation. See "Damages," Dec. Dig. (Key No.) §§ 39, 100; Cent. Dig. §§ 237-241.

<sup>295</sup> United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255; Hawley v. Hodge, 7 Vt. 237; Smith & Benham v. Curvan & Hussey (C. C.) 138 Fed. 150; McKenzie v. Mitchell, 123 Ga. 72, 51 S. E. 34. See "Damages," Dec. Dig. (Key No.) § 45; Cent. Dig. §§ 92-98.

<sup>296</sup> Ottawa Gas Light & Coke Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263; Holt v. Sargent, 15 Gray (Mass.) 97; Jackson Architectural Iron Works v. Hurlbut, 15 Misc. Rep. 93, 36 N. Y. Supp. 808; Trinity & S. Ry. Co. v. Schofield, 72 Tex. 496, 10 S. W. 575; Watson v. Town of New Millford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345; Atwood v. Boston Forwarding and Transfer Co., 185 Mass. 557, 71 N. E. 72; Dovelaar v. City of Milwaukee, 123 Wis. 413, 101 N. W. 361. See "Damages," Dec. Dig. (Key No.) § 44; Cent. Dig. §§ 90, 91.

<sup>297</sup> Chicago City R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758; Vedder v. Delaney, 123 Iowa, 583, 98 N. W. 373; Lewark v. Parkinson, 73 Kan. 553, 85 Pac. 601, 5 L. R. A. (N. S.) 1069; Wil-

consequences of the wrong.<sup>298</sup> And so long as the expenses are certain in amount, reasonable, and liability therefor is actually incurred, it does not effect the right of recovery that they have not yet been paid.<sup>299</sup>

*Same—Expenses of Litigation*

The expenses of litigation to obtain compensation for a wrong, though the natural and probable consequence of an injury, cannot usually be recovered as damages.<sup>300</sup> "In gen-

liams v. City of West Bay City, 119 Mich. 395, 78 N. W. 328; Busch v. Robinson, 46 Or. 539, 81 Pac. 237; Sanford v. Inhabitants of Augusta, 32 Me. 536; Holyoke v. Grand Trunk Ry., 48 N. H. 541. See "Damages," *Dec. Dig.* §§ 43, 101; *Cent. Dig.* §§ 242-254.

<sup>298</sup> See ante, p. 90.

<sup>299</sup> Forbes v. Loftin, 50 Ala. 396; Donnelly v. Hufschmidt, 79 Cal. 74, 21 Pac. 546; Lacas v. Detroit City Ry. Co., 92 Mich. 412, 52 N. W. 745; Gries v. Zeck, 24 Ohio St. 329; Curtis v. McNair, 173 Mo. 370, 73 S. W. 167; Omaha St. R. Co. v. Emminger, 57 Neb. 240, 77 N. W. 675; Consolidated Coal Co. of St. Louis v. Scheiber, 65 Ill. App. 304; City of Abilene v. Wright, 4 Kan. App. 708, 46 Pac. 715; Berg v. United States Leather Co., 125 Wis. 262, 104 N. W. 60. Compare Harndon v. Stultz, 124 Iowa, 734, 100 N. W. 851, where recovery was not allowed for expenses not yet definitely ascertained or actually incurred. See "Damages," *Dec. Dig.* (Key No.) § 46; *Cent. Dig.* §§ 99, 251.

<sup>300</sup> CONTRACTS. Goodbar v. Lindsey, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54; Vorse v. Phillips, 37 Iowa, 428; McKenzie v. Mitchell, 123 Ga. 72, 51 S. E. 34; Offutt v. Edwards, 9 Rob. (La.) 90.

TORTS. Flanders v. Tweed, 15 Wall. 450, 21 L. Ed. 203; Boardman v. Marshalltown Grocery Co., 105 Iowa, 445, 75 N. W. 343; Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994; Kelly v. Rogers, 21 Minn. 146; Winkler v. Roeder, 23 Neb. 706, 37 N. W. 607, 8 Am. St. Rep. 155; Atkins v. Gladwish, 25 Neb. 390, 41 N. W. 347; Hicks v. Foster, 13 Barb. (N. Y.) 663; Welch v. Northeastern R. Co., 12 Rich. (S. C.) 390; Barnard v. Poor, 21 Pick. (Mass.) 378; Bishop v. Hendrick, 82 Hun, 323, 31 N. Y. Supp. 502. And see Burruss v. Hines, 94 Va. 413, 26 S. E. 875. Not even when the action was vexatious. Salado College v. Davis, 47 Tex. 131. In some cases, the jury have been permitted to consider such expenses for the purpose of giving full indemnity. Whipple v. Cumberland Mfg. Co., 2 Story, 661, Fed. Cas. No. 17,516; Platt v. Brown, 30 Conn. 336; Welch v. Durand, 36 Conn. 182, 4 Am. Rep. 55;

eral, the law considers the taxed costs as the only damage which a party sustains by the defense of a suit against him, and these he recovers by the judgment in his favor."<sup>801</sup> The rule excludes compensation for counsel<sup>802</sup> and witness<sup>803</sup>

*Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524; *Armstrong v. Pierson*, 8 Iowa, 29; *Rose v. Belyea*, 1 Hann, 109.

Council fees in admiralty suits are not allowed, *Arcambel v. Wiseman*, 3 Dall. 306, 1 L. Ed. 613; *The Margaret v. Connestoga*, 8 Wall. Jr. 116, Fed. Cas. No. 9,070; though the rule has been doubted, *The Appollon*, 9 Wheat. 362, 6 L. Ed. 111; *Canter v. American Ins. Co.*, 3 Pet. 307, 7 L. Ed. 688. Nor in patent suits, *Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatchf. 258, Fed. Cas. No. 1,521; *Stimpson v. The Railroads*, 1 Wall. Jr. 164, Fed. Cas. No. 13,456; *Whittemore v. Cutter*, 1 Gall. 429, Fed. Cas. No. 17,600, though the contrary has been held, *Boston Mfg. Co. v. Fiske*, 2 Mason, 119, Fed. Cas. No. 1,681; *Pierson v. Eagle Screw Co.*, 3 Story, 402, Fed. Cas. No. 11,156; *Allen v. Blunt*, 2 Woodb. & M. 121, Fed. Cas. No. 217. Where an assessment is made for a contractor, and is held invalid in his suit against the owner to collect it, in a subsequent action against the city to recover the contract price of the work the contractor cannot recover counsel fees in the prior suit. *City of Toledo v. Goulden*, 6 O. C. D. 445; *City of Cincinnati v. Steadman*, 8 Ohio Cir. Ct. R. 407. Where a city erroneously assumes that a certain way is a public street, and passes an ordinance to change its grade, an abutting owner is entitled to recover of the city the expense incurred by him in showing that it has no rights in such way. *Huckestein v. Allegheny City*, 165 Pa. 367, 30 Atl. 982. Where property is wrongfully seized on execution, the owner is entitled to a reasonable amount for attorney's fees expended in an action to protect his rights. *Gilkerson-Sloss Commission Co. v. Yale*, 47 La. Ann. 690, 17 South. 244. See "Costs," *Dec. Dig. (Key No.)* §§ 146-149; *Cent. Dig.* §§ 567-576; "Damages," *Dec. Dig. (Key No.)* § 71; *Cent. Dig.* §§ 146-153.

<sup>801</sup> *Young v. Courtney*, 13 La. Ann. 193. See, also, *Adams v. Cordis*, 8 Pick. (Mass.) 260. See "Damages," *Dec. Dig. (Key No.)* §§ 66-73; *Cent. Dig.* §§ 135-152; "Costs," *Dec. Dig. (Key No.)* §§ 146-149; *Cent. Dig.* §§ 567-576.

<sup>802</sup> *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43; *Henry v. Davis*, 123 Mass. 345; *Warren v. Cole*, 15 Mich. 265; *Haverstick v. Erie Gas Co.*, 29 Pa. 254; *Guild v. Guild*, 2 Metc. (Mass.) 229. See "Damages," *Dec. Dig. (Key No.)* §§ 66-73; *Cent. Dig.* §§ 135-152; "Costs," *Dec. Dig. (Key No.)* §§ 172, 173; *Cent. Dig.* §§ 665-690.

<sup>803</sup> *Gulf, C. & S. F. Ry. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19. See "Damages," *Dec. Dig. (Key No.)* §§ 66-73; *Cent. Dig.* §§ 135-152; "Costs," *Dec. Dig. (Key No.)* §§ 184-187; *Cent. Dig.* §§ 715-736; "Witnesses," *Cent. Dig.* § 50.



fees, and for time and expense in attending court.<sup>304</sup> The law has arbitrarily fixed the taxable costs as the limit of compensation for this class of losses.<sup>305</sup> Beyond this, the loss is *damnum absque injuria*. In some states a recovery for expenses beyond taxable costs has been allowed in cases where exemplary damages have been held proper;<sup>306</sup> but these cases have not been generally followed, and are difficult to be sustained on principle, for such damages are plainly compensatory.<sup>307</sup> "The punishment of defendant's delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit."<sup>308</sup>

Where prior litigation was a part of the wrong for which damages are presently claimed, the expenses of that litiga-

<sup>304</sup> *Jacobson v. Poindexter*, 42 Ark. 97. See "*Damages*," *Dec. Dig. (Key No.)* §§ 70-73; *Cent. Dig.* § 147.

<sup>305</sup> *Sedg. Dam.* 339.

<sup>306</sup> *Wynne v. Parsons*, 57 Conn. 73, 17 Atl. 363; *Maisenbacker v. Society Concordia*, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79; *Bennett v. Gibbons*, 55 Conn. 450, 452, 12 Atl. 99; *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552. In *Noyes v. Ward*, 19 Conn. 250, where a second trial became necessary in an action for assault and battery, it was held that the expenses of the first trial might be considered. See, also, *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524; *Stevenson v. Morris*, 37 Ohio St. 10, 41 Am. Rep. 481; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Roberts v. Mason*, 10 Ohio St. 277; *Thompson v. Powning*, 15 Nev. 195; *Titus v. Corkins*, 21 Kan. 722; *Marshall v. Betner*, 17 Ala. 832; *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98; *Taylor v. Morton*, 61 Miss. 24; *Landa v. Obert*, 45 Tex. 539. See "*Damages*," *Dec. Dig. (Key No.)* §§ 70-73, 87, 94; *Cent. Dig.* §§ 146-153, 188-192, 218-221.

<sup>307</sup> *Howell v. Scoggins*, 48 Cal. 355; *Falk v. Waterman*, 49 Cal. 224; *Kelly v. Rogers*, 21 Minn. 146; *Halstead v. Nelson*, 24 Hun, 395; *Welch v. Northeastern R. Co.*, 12 Rich. (S. C.) 290; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Earl v. Tupper*, Id. 275. See "*Damages*," *Dec. Dig. (Key No.)* §§ 70-73, 87, 94; *Cent. Dig.* §§ 146-153, 188-221.

<sup>308</sup> *Day v. Woodworth*, 13 How. 363, 371, 14 L. Ed. 181, approved in *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43. See, also, *Fairbanks v. Witter*, 18 Wis. 287, 290, 86 Am. Dec. 765. See "*Damages*," *Dec. Dig. (Key No.)* §§ 70-73, 87-94; *Cent. Dig.* §§ 146-153, 188-221.

tion are, of course, an element of the damages.<sup>309</sup> And, generally, where one has in good faith defended an action for the benefit of another, or on account of the latter's wrong, he may, in a subsequent action, recover his costs and expenses, including reasonable counsel fees, if the prior litigation was a natural consequence of the wrong, and necessary to determine the rights of the parties.<sup>310</sup> The rule is not universal, how-

<sup>309</sup> *O'Horo v. Kelsey*, 60 App. Div. 604, 70 N. Y. Supp. 14. See "*Damages*," *Dec. Dig. (Key No.)* §§ 70-73; *Cent. Dig.* §§ 146-152.

<sup>310</sup> *Baxendale v. Railway Co.*, L. R. 10 Exch. 35; *Dubois v. Hermance*, 56 N. Y. 673; *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241; *Hughes v. Graeme*, 33 Law J. Q. B. 335; *Ralph v. Crouch*, L. R. 3 Exch. 44; *Inhabitants of Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Bank of Palo Alto v. Pacific Postal Tel. & Cable Co.*, (C. C.) 103 Fed. 841; *First National Bank of Hutchinson v. Williams*, 62 Kan. 431, 63 Pac. 744; *Fowler v. Owen*, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588. Where the litigation was unnecessary, neither costs nor counsel fees can be recovered. *Lunt v. Wrenn*, 113 Ill. 168. In an action on an injunction or attachment bond, counsel fees in obtaining a dissolution of the injunction or attachment may be recovered. *Holmes v. Weaver*, 52 Ala. 516; *Bolling v. Tate*, 65 Ala. 417, 30 Am. Rep. 5; *Graves v. Moore*, 58 Cal. 435; *Wittich v. O'Neal*, 23 Fla. 592; *Cummings v. Burleson*, 78 Ill. 281; *Morris v. Price*, 2 Blackf. (Ind.) 457; *Raupman v. City of Evansville*, 44 Ind. 392; *Swan v. Timmons*, 81 Ind. 243; *Sanford v. Willetts*, 29 Kan. 647; *Tyler v. Safford*, 31 Kan. 608, 3 Pac. 333; *Trapnall v. McAfee*, 3 Metc. (Ky.) 34, 77 Am. Dec. 176; *Littlejohn v. Wilcox*, 2 La. Ann. 620; *Swift v. Plessner*, 39 Mich. 178; *Miles v. Edwards*, 6 Mont. 180, 9 Pac. 814; *Raymond Bros. v. Green*, 12 Neb. 215, 10 N. W. 709, 41 Am. Rep. 763; *Brown v. Jones*, 5 Nev. 374; *Corcoran v. Judson*, 24 N. Y. 106; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Rose v. Post*, 56 N. Y. 603; *Alexander v. Jacoby*, 23 Ohio St. 358; *Lillie v. Lillie*, 55 Vt. 470. Contra, *Oliphint v. Mansfield*, 36 Ark. 191; *Patton v. Garrett*, 37 Ark. 605; *Wallace v. York*, 45 Iowa, 81; *Lowenstein v. Monroe*, 55 Iowa, 82, 7 N. W. 406. In *Baggett v. Beard*, 43 Miss. 120, the expense of the principal suit was held recoverable in an action on an injunction bond. But the weight of authority is the other way. See *Frost v. Jordon*, 37 Minn. 544, 36 N. W. 713; *Stringfield v. Hirsch*, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733; *Jacobus v. Monongahela Nat. Bank* (C. C.) 35 Fed. 395; *Randall v. Carpenter*, 88 N. Y. 293; *Alexander v. Jacoby*, 23 Ohio St. 358; *Lillie v. Lillie*, 55 Vt. 470; *Copeland v. Cunningham*, 63 Ala. 394; *Bustamente v. Stewart*, 55 Cal. 115; *Vorse v. Phillips*, 37 Iowa, 428; *Brinker v. Leinkauff*,

ever.<sup>311</sup> Where plaintiff was successful in the prior litigation, it is sometimes held that counsel fees cannot be recovered, for

64 Miss. 236, 1 South. 170. In an action for breach of covenants of seisin or warranty, or for false representations, the reasonable counsel fees in litigation in which one engaged, relying on the covenant or representation, may be recovered if it was a legitimate consequence of the covenant or representation. Sedg. Dam. 356; *Levitzky v. Canning*, 33 Cal. 299; *Harding v. Larkin*, 41 Ill. 413; *Robinson v. Lemon*, 2 Bush. (Ky.) 301; *Ryerson v. Chapman*, 66 Me. 557; *Allis v. Nininger*, 25 Minn. 525; *Kennison v. Taylor*, 18 N. H. 220; *Keeler v. Wood*, 30 Vt. 242; *Smith v. Sprague*, 40 Vt. 43; *Dalton v. Bowker*, 8 Nev. 190. Contra, *Jeter v. Glenn*, 9 Rich. (S. C.) 374; *Clark v. Mumford*, 62 Tex. 531. In Massachusetts, it has been held that the costs, but not the counsel fees may be recovered. See *Leffingwell v. Elliott*, 10 Pick. 204; *Reggio v. Braggiotti*, 7 Cush. 166. The same principles apply in actions on indemnity bonds. *Hadsell v. Inhabitants of Hancock*, 3 Gray, 526; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *Graves v. Moore*, 58 Cal. 435. But see *Russell v. Walker*, 150 Mass. 531, 23 N. E. 383, 15 Am. St. Rep. 239, and *McDaniel v. Crabtree*, 21 Ark. 431.

When, as the necessary and proximate consequence of a breach of contract, plaintiff is compelled to engage in litigation, his reasonable expenses may be recovered. *Dubois v. Hermance*, 56 N. Y. 673; *New Haven & N. Co. v. Hayden*, 117 Mass. 433; *Hagan v. Riley*, 13 Gray (Mass.) 515; *Pond v. Harris*, 113 Mass. 114; *Call v. Hagar*, 69 Me. 521; *Shaw v. Mayor, etc., of City of Macon*, 19 Ga. 468; *City of Ottumwa v. Parks*, 43 Iowa, 119; *Henderson v. Squire*, L. R. 4 Q. B. 170. "If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit, and may call upon him to defend it. If he fails to defend, then, if liable over, he is liable, not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense." *Inhabitants of Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292. See, also, *City of Ottumwa v. Parks*, 43 Iowa, 119; *Griffin v. Brown*, 2 Pick. (Mass.) 304; *Osborne & Co. v. Ehrhard*, 37 Kan. 413, 15 Pac. 590; *Hynes v. Patterson*, 95 N. Y. 1. Notice of suit is essential to liability. *Inhabitants of Lowell v. Boston & L. R. Co.*, 23 Pick. 24, 34 Am. Dec. 33; *Chase v. Bennett*, 59 N. H. 394. In an action for malicious prosecution, the expenses of the malicious proceeding may be recovered. *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Krug v. Ward*, 77 Ill. 603; *Ziegler v. Powell*, 54 Ind. 173; *McCardle v. McGinley*, 86 Ind. 538, 44 Am. Rep. 343; *Lytton v. Baird*, 95 Ind. 349; *Gregory v. Cham-*

<sup>311</sup> See note 311 on following page.

he has received the taxed costs, which are regarded in the eyes of the law as full indemnity. But, as Mr. Sedgwick has said,<sup>312</sup> in speaking of the legal fiction that the taxable costs are a full indemnity for the expenses of litigation, it is very doubtful if the rule ever applies except as between the parties to the suit, for the reason of the rule is that the taxable costs are an arbitrary sum awarded by law to be paid by the losing to the prevailing party.

### **SAME—PHYSICAL PAIN AND INCONVENIENCE**

**38. Compensation may always be recovered for physical pain which is the proximate and certain result of a wrong.**

**39. Inconvenience may be compensated when it amounts to physical discomfort, but not otherwise.**

Physical pain and suffering, if it is the proximate and certain result of the wrong, is always an element of compensation;<sup>313</sup> and in estimating the amount of compensation,

bers, 78 Mo. 294; *Magner v. Renk*, 65 Wis. 364, 27 N. W. 26. But the expense of setting stock aside as exempt is not recoverable as damages in an action for maliciously suing out a distress warrant. *Sturgis v. Frost*, 56 Ga. 188. The expense of procuring a discharge from imprisonment may be recovered in an action for false imprisonment. *Bonesteel v. Bonesteel*, 30 Wis. 511; *Parsons v. Harper*, 16 Grat. (Va.) 64; *Blythe v. Tompkins*, 2 Abb. Prac. 468; *Foxall v. Barnett*, 2 El. & Bl. 928; *Pritchett v. Boevey*, 1 Crompt. & M. 775. Contra, *Bradlaugh v. Edwards*, 11 C. B. (N. S.) 377. See "*Damages*," *Dec. Dig. (Key No.)* §§ 70-73; *Cent. Dig. §§ 146-153*.

<sup>312</sup> *Leffingwell v. Elliott*, 10 Pick. (Mass.) 204; *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166. And see *White River L. & W. R. Co. v. Star Ranch & Land Co.*, 77 Ark. 128, 91 S. W. 14, where it is said that attorney's fees are not ordinarily an element of damages which can be recovered on breach of contract. See "*Damages*," *Dec. Dig. (Key No.)* §§ 70-73; *Cent. Dig. §§ 146-153*.

<sup>313</sup> *Sedg. Dam. § 349*.

<sup>314</sup> *GOODHART v. PENNSYLVANIA R. CO.*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705, *Cooley, Cas. Damages*, 102; *Ransom v. New York & E. R. Co.*, 15 N. Y. 415; *Totten v. Pennsyl-*

future suffering, if it is a reasonably certain result of the wrong, may be taken into consideration.<sup>214</sup> It makes no difference that the present injury has aggravated or has been aggravated by a pre-existing disease.<sup>215</sup> The plaintiff

vania R. Co. (C. C.) 11 Fed. 564; Grant v. Union Pac. R. Co. (C. C.) 45 Fed. 673; South & N. A. R. Co. v. McLendon, 63 Ala. 266; Louisville & N. R. Co. v. Binion, 107 Ala. 645, 18 South. 75; Chicago, B. & Q. R. Co. v. Warner, 108 Ill. 538; Peoria Bridge Ass'n v. Loomis, 20 Ill. 235, 71 Am. Dec. 263; Chicago, B. & Q. R. Co. v. Avery, 10 Ill. App. 210; Central Ry. Co. v. Serfass, 153 Ill. 379, 39 N. E. 119; City of Sandwich v. Dolan, 141 Ill. 430, 31 N. E. 416; City of Chicago v. Davis, 110 Ill. App. 427; Pence v. Wabash R. Co., 116 Iowa, 279, 90 N. W. 59; City of Indianapolis v. Gaston, 58 Ind. 224; Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 165; Verrill v. Inhabitants of Minot, 31 Me. 299; Pittsburgh & C. R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568; Kinney v. Folkerts, 84 Mich. 616, 48 N. W. 283; Southern R. in Kentucky v. Goddard, 121 Ky. 567, 89 S. W. 675; Morris v. St. Paul City Ry. Co., 105 Minn. 276, 117 N. W. 500, 17 L. R. A. (N. S.) 598; Holyoke v. Grand Trunk Ry., 48 N. H. 514; Ridenhour v. Kansas City Cable Ry. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; Klein v. Jewett, 26 N. J. Eq. 474; Kane v. New York N. H. & H. R. Co., 132 N. Y. 160, 30 N. E. 256; Weber v. International R. Co., 57 Misc. 157, 107 N. Y. Supp. 965; McLaughlin v. City of Corry, 77 Pa. 109, 18 Am. Rep. 432; Schenkel v. Pittsburgh & B. Traction Co., 194 Pa. St. 182, 44 Atl. 1072; Musick v. Borough of Latrobe, 184 Pa. 375, 39 Atl. 226; Hill v. Union Ry. Co., 25 R. I. 565, 57 Atl. 374; Shell v. City of Appleton, 49 Wis. 125, 5 N. W. 27, following Goodno v. City of Oshkosh, 28 Wis. 300. See "Damages," Dec. Dig. (Key No.) § 32; Cent. Dig. §§ 40, 41, 71.

<sup>214</sup> Union Pac. R. Co. v. Jones, 49 Fed. 343, 1 C. C. A. 282; Atlanta & W. P. R. R. v. Johnson, 66 Ga. 259; Fry v. Dubuque & S. W. Ry. Co., 45 Iowa, 416; Curtis v. Rochester & S. R. Co., 18 N. Y. 534, 75 Am. Dec. 258; Kane v. New York N. H. & H. R. Co., 132 N. Y. 160, 30 N. E. 256; Stutz v. Chicago & N. W. Ry. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769; Green v. Catawba Power Co., 75 S. C. 102, 55 S. E. 125; Foley v. Everett, 142 Ill. App. 250; Howard v. Henderson Traction Co. (Ky.) 121 S. W. 954. "See "Damages," Dec. Dig. (Key No.) § 32; Cent. Dig. §§ 40, 41, 71.

<sup>215</sup> Mathew v. Wabash R. Co., 115 Mo. App. 468, 78 S. W. 271, 81 S. W. 646, affirmed in 199 U. S. 605, 26 Sup. Ct. 752, 50 L. Ed. 329; Spade v. Lynn & B. R. Co., 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298; Schwingschlegel v. City of Monroe, 113 Mich. 683, 72 N. W. 7; WATSON v. RINDER-

may recover for such pain and suffering as is the natural and proximate result of the injury.

Of course, pain cannot be measured in money. The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance made because of the suffering consequent on the injury.<sup>816</sup>

The amount of damages awarded for pain and suffering is necessarily left to the sound discretion and good sense of the jury, under proper instructions depending on the circumstances of each particular case, as there is no arithmetical rule by which the equivalent for such injuries can be measured in money.<sup>817</sup>

Damages cannot be recovered for inconvenience or annoyance,<sup>818</sup> unless it amounts to physical discomfort.<sup>819</sup> "The

KNECHT, 82 Minn. 235, 84 N. W. 798, Cooley, Cas. Damages, 22; Jordan v. City of Seattle, 30 Wash. 298, 70 Pac. 743; Ohio & M. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. 297; McGorrah v. New York, N. H. & H. R. Co., 171 Mass. 211, 50 N. E. 610; Owens v. Kansas City, St. J. & C. B. R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Ross v. Great Northern R. Co., 101 Minn. 122, 111 N. W. 951; Atlantic Coast Line R. Co. v. Dees, 56 Fla. 127, 48 South. 28. Compare Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961. See "Damages," Dec. Dig. (Key No.) § 33; Cent. Dig. § 42.

<sup>816</sup> GOODHART v. PENNSYLVANIA R. CO., 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705, Cooley, Cas. Damages, 102. See "Damages," Dec. Dig. (Key No.) § 32; Cent. Dig. §§ 40, 41, 71.

<sup>817</sup> Ransom v. New York & E. R. Co., 15 N. Y. 415; Morris v. Chicago, B. & Q. R. Co., 45 Iowa, 29; Bigelow v. Metropolitan St. Ry. Co., 48 Mo. App. 367; St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 887; Pennsylvania R. Co. v. Allen, 53 Pa. 276; Hoon v. Boise City Canal Co., 7 Idaho, 640, 65 Pac. 145; Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. See "Damages," Dec. Dig. (Key No.) § 97; Cent. Dig. §§ 233, 234.

<sup>818</sup> TURNER v. GREAT NORTHERN RY. CO., 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883, Cooley, Cas. Damages, 105; Hamlin v. Railway Co., 1 Hurl. & N. 408; D'Orval v. Hunt, Dud. (S. C.) 180; Russell v. Western Union Tel. Co., 3 Dak. 315, 19 N. W. 408; Wilcox v. Richmond & D. R. Co., 3 C. C. A. 73, 52 Fed. 264, 17 L. R. A. 804; Yoakum v. Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411. See "Damages," Dec. Dig. (Key No.) § 49; Cent. Dig. § 100.

<sup>819</sup> Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317,

injury must be physical, as distinguished from one purely imaginative. It must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy."<sup>20</sup>

### **SAME—MENTAL SUFFERING**

40. Mental suffering standing alone will not, in most jurisdictions, support an action where damages is the gist of the wrong.

41. Mental suffering which is the proximate and certain result of conduct actionable per se, whether a tort or breach of contract, may be compensated.

**EXCEPTION**—In many states compensation cannot be recovered for mental suffering resulting from a breach of contract.

#### *Mental Suffering as a Distinct Cause of Action or Element of Damage*

It is undoubtedly the rule in most jurisdictions that mental suffering alone is not a distinct cause of action or element of damage,<sup>21</sup> though, as will be seen, in many jurisdictions in

<sup>20</sup> Sup. Ct. 719, 27 L. Ed. 739; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Southern Kan. Ry. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; *Emery v. City of Lowell*, 109 Mass. 197; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Luse v. Jones*, 39 N. J. Law, 707; *Ives v. Humphreys*, 1 E. D. Smith, 196; *Scott Tp. v. Montgomery*, 95 Pa. 444. But see *Walsh v. Chicago, M. & St. P. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376. See "Damages," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 100.

<sup>21</sup> *Westcott v. Middleton*, 43 N. J. Eq. 478, 486, 11 Atl. 490; *Id.*, 44 N. J. Eq. 297, 18 Atl. 80. And see *BALTIMORE & O. R. CO. v. CARR*, 71 Md. 135, 17 Atl. 1052, *Cooley, Cas. Damages*, 204. See "Damages," *Dec. Dig. (Key No.)* §§ 48, 49; *Cent. Dig.* §§ 100, 103.

<sup>22</sup> *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; *Lynch v. Knight*, 9 H. L. Cas. 577; *Alsop v. Alsop*, 5 Hurl. & N. 534; *Kalen v. Terre Haute & I. R. Co.*, 18 Ind. App. 202, 47 N. E. 694, 63 Am. St. Rep. 343; *Gatzow v. Buen-*

which the general rule prevails, the nature of the wrong on which the claim for damages is based has given rise to modifications and exceptions.

The reason usually given is that such suffering, as a ground for the recovery of damages, is vague, sentimental, or metaphysical; that the suffering of one person is no criterion by which to estimate the sufferings of another, differently constituted, and that it is too difficult to be weighed and assessed on the basis of a pecuniary compensation.<sup>322</sup> But mental suffering is no more vague, fluctuating, or difficult to estimate than physical suffering which is always a subject for compensation; nor is it any the less real. "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal, and the other external; one

ing, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 324, 3 Am. Rep. 245; *Crawson v. Western Union Tel. Co.* (C. C.) 47 Fed. 544; *Illinois Cent. Ry. Co. v. Siddons*, 53 Ill. App. 607; *Joch v. Dankwardt*, 85 Ill. 331; *Gleen v. Western Union Tel. Co.*, 1 Ga. App. 821, 58 S. E. 83, following *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, and *Giddens v. Western Union Tel. Co.*, 111 Ga. 824, 35 S. E. 638; *SUMMERFIELD v. WESTERN UNION TEL. CO.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17, *Cooley, Cas. Damages*, 122; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Chase v. Western Union Tel. Co.* (C. C.) 44 Fed. 554, 10 L. R. A. 464; *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846, overruling *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; *COLE v. GRAY*, 70 Kan. 705, 79 Pac. 654, *Cooley, Cas. Damages*, 184; *Norris v. Southern Ry., Carolina Division*, 24 S. C. 15, 65 S. E. 956. See, also, post, p. 164, where the rule relating to damages for failure to deliver telegrams is considered. The rule is generally stated that there can be no recovery for mental anguish not connected with physical injury; but a more accurate statement is that mental anguish, to be an element of damages, must be accompanied by some material damage. See A. G. Sedgwick, *Elements of the Law of Damages*, 101, 102, discussing *Lynch v. Knight*, 9 H. L. Cas. 577. See "*Damages*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 100.

<sup>322</sup> See dissenting opinion of Judge Lurton in *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 721, 8 S. W. 582, 6 Am. St. Rep. 864. See "*Telegraph and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.



mental, the other physical. In either case the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings; but, at the last, the amount is indefinite."<sup>323</sup> Where the law recognizes a right to compensation for an injury, difficulty in estimating the extent of the injury has never been regarded as a ground for withholding all damages.<sup>324</sup> The law solves such difficulties by leaving them to the sound discretion of a jury.<sup>325</sup>

The real reason underlying the rule refusing damages for mental suffering alone is that mental tranquility has never been regarded as a right recognized and protected by law.<sup>326</sup> The law does not provide a remedy for every possible injury which a man may suffer.<sup>327</sup> It protects his person, his property, and his reputation; but his emotions are beyond the domain of rights protected by law. An act causing mental suffering alone is therefore not a tort, as no legal right is invaded. Mere negligence is not a tort, unless it results in damage with respect to a right protected by law.<sup>328</sup>

Consequently where the negligent or wrongful act of one person puts another in a position of peril, and thereby causes

<sup>323</sup> *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. See "*Damages*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 100.

<sup>324</sup> *Wadworth v. Western Union Tel. Co.*, 86 Tenn. 695, 711, 8 S. W. 574, 6 Am. St. Rep. 864. See "*Damages*," *Dec. Dig. (Key No.)* §§ 49, 50; *Cent. Dig.* § 100.

<sup>325</sup> *Young v. Western Union Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883; *Lucas v. Flinn*, 35 Iowa, 9; *Ballou v. Farnum*, 11 Allen (Mass.) 73, 77, 78. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>326</sup> See ante, chapter I.

<sup>327</sup> *Katen v. Terre Haute & I. R. Co.*, 18 Ind. App. 202, 47 N. E. 694, 63 Am. St. Rep. 343. See "*Damages*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 100.

<sup>328</sup> *Haile's Curator v. Texas & P. R. Co.*, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Bucknam v. Great Northern Ry. Co.*, 76 Minn. 373, 29 N. W. 98. See, also, *Sanderson v. Northern Pac. R. Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509. See "*Damages*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 100.

fear and apprehension in the mind of the latter, but no actual harm results, there is no cause of action.<sup>320</sup> And even where there is actual fright, it is held in many jurisdictions that the fright if not accompanied by contemporaneous physical injury, will not support an action for damages.<sup>320</sup> So, too, mere insulting words, though causing mental suffering, are not actionable.<sup>321</sup>

Since defamatory words are not actionable, unless followed by damage, actual or presumed, if the words are not actionable per se, and no special damage is proved, the mere fact that the words cause mental anguish will not support the action.<sup>322</sup>

<sup>320</sup> *Hall v. Incorporated Town of Manson*, 90 Iowa, 585, 58 N. W. 881; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453. See "*Damages*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 100.

<sup>321</sup> *Hack v. Dody*, 134 App. Div. 253, 118 N. Y. Supp. 906; *Victorian Ry's Com'rs v. Coultas*, L. R. 13 App. Cas. 222; *Haas v. Metz*, 78 Ill. App. 46; *Reed v. Ford*, 129 Ky. 471, 112 S. W. 600, 19 L. R. A. (N. S.) 225; *Hutchinson v. Stern*, 115 App. Div. 791, 101 N. Y. Supp. 145; *Hess v. American Pipe Mfg. Co.*, 22 Pa. 67, 70 Atl. 294; *Ewing v. Pittsburgh, C. & St. L. Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; *Huston v. Freemansburg Borough*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49; *Sanderson v. Northern Pac. Ry. Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509; *White v. Sander*, 168 Mass. 296, 47 N. E. 90; *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 Atl. 202, 9 L. R. A. (N. S.) 740; *Williamson v. Central of Georgia R. Co.*, 127 Ga. 125, 56 S. E. 119; *Gulf, C. & S. F. Ry. Co. v. Hayter* (Tex. Civ. App.) 55 S. W. 128; *Morse v. Chesapeake & O. Ry. Co.*, 117 Ky. 11, 77 S. W. 361; *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 235. See "*Damages*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 100.

<sup>322</sup> *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; *Grayson v. St. Louis Transit Co.*, 100 Mo. App. 60, 71 S. W. 730; *Georgia R. & Electric Co. v. Baker*, 1 Ga. App. 832, 58 S. E. 88; *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 84 Ark. 42, 104 S. W. 551, 13 L. R. A. (N. S.) 159. See "*Damages*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* § 100.

<sup>323</sup> *Lynch v. Knight*, 9 H. L. Cas. 577; *Prime v. Eastwood*, 45 Iowa, 640. See, also, *Alsop v. Alsop*, 5 Hurl. & N. 534. In an action for injuring plaintiff's horse in a brutal manner, accompany-

The general rule that mental suffering alone is not a cause of action or a distinct element of damage, though concurred in by most jurisdictions, is not universal. There are some jurisdictions in which mental suffering, though not accompanied by any contemporaneous material loss, personal or pecuniary, is held to be a distinct cause of action or element of damage,<sup>323</sup> applying this rule especially in cases involving negligent delay in the delivery of telegrams.<sup>324</sup>

ing the act with malicious insults, plaintiff is entitled to damages for mental suffering. *Kimball v. Holmes*, 60 N. H. 163. But where defendant circulated reports about plaintiff which caused him mental suffering, but were not otherwise actionable, he cannot recover for mental suffering. *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420. But, if the words had been actionable *per se*, damages for mental suffering could have been recovered. *Adams v. Smith*, 58 Ill. 417. It is difficult to see any sound reason for the distinction. See "*Damages*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* § 100; "*Libel and Slander*," *Dec. Dig. (Key No.)* § 119; *Cent. Dig.* § 347.

<sup>323</sup> *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; *Enders v. Skannal*, 35 La. Ann. 1000. See, also, *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, 76 Pac. 931, 65 L. R. A. 666, 103 Am. St. Rep. 776. The mental suffering must, however, be something more than mere disappointment or regret. *Hancock v. Western Union Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *MENTZER v. WESTERN UNION TEL. CO.*, 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294, *Cooley, Cas. Damages*, 115; *Bowers v. Western Union Tel. Co.*, 135 N. C. 504, 47 S. E. 597; *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Western Union Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; *Shervill v. Western Union Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *Cates v. Western Union Tel. Co.*, 151 N. C. 497, 66 S. E. 592, 24 L. R. A. (N. S.) 1286; *Missouri, K. & T. Ry. Co. of Texas v. Lightfoot*, 48 Tex. Civ. App. 120, 106 S. W. 395; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148. And in *Glenn v. Western Union Tel. Co.*, 1 Ga. App. 821, 58 S. E. 83, the court disapproved the rule that mental suffering is not a distinct element of damages and suggested legislation. But see *Sappington v. Atlanta & W. P. R. Co.*, 127 Ga. 178, 56 S. E. 311. See "*Damages*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 100.

<sup>324</sup> See cases in note above and also, see, post, p. 164. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 79.

But many courts which insist on the general rule that mental anguish alone is not a cause of action recognize an exception to the rule if the injury is willful or malicious.<sup>335</sup> The theory on which recovery is permitted in such cases is that there is an infringement of a legal right, as in cases of assault without physical contact.<sup>336</sup> As was said in *Larson v. Chase*,<sup>337</sup> where the action was for damages for the unlawful mutilation and dissection of the body of plaintiff's deceased husband: "Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequences of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and

<sup>335</sup> *Randolph v. Hannibal & St. J. Ry. Co.*, 18 Mo. App. 609; *Carter v. Oster*, 134 Mo. App. 146, 113 S. W. 995; *Dirmeyer v. O'Hern*, 39 La. Ann. 961, 3 South. 132; *Moyer v. Gordon*, 113 Ind. 282, 14 N. E. 476; *Wolf v. Trinkle*, 103 Ind. 355, 3 N. E. 110; *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397; *Illinois Cent. Ry. Co. v. Siddons*, 53 Ill. App. 607; *Smith v. Atchison, T. & S. F. R. Co.*, 122 Mo. App. 85, 97 S. W. 1007; *Rowan v. Western Union Tel. Co. (C. C.)* 149 Fed. 550; *Dunn v. Western Union Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189. See, also, *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, and *SUMMERFIELD v. WESTERN UNION TEL. CO.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17, *Cooley, Cas. Damages*, 122. Compare *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S. W. 1005. In Louisiana the damages in such case are regarded as in the nature of exemplary. *Dirmeyer v. O'Hern*, 39 La. Ann. 961, 3 South. 132. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 105, 319, 382, 416; *Cent. Dig.* §§ 453, 1338, 1487; "*Damages*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 100; "*Libel and Slander*," *Dec. Dig. (Key No.)* § 119; *Cent. Dig.* § 347.

<sup>336</sup> *Wolf v. Trinkle*, 103 Ind. 355, 3 N. E. 110; *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397; *Randolph v. Hannibal & St. J. Ry. Co.*, 18 Mo. App. 609. See "*Assault and Battery*," *Dec. Dig. (Key No.)* § 38; *Cent. Dig.* § 53.

<sup>337</sup> *LARSON v. CHASE*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, *Cooley, Cas. Damages*, 107. See, also, *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, where the action though for a technical trespass was for damages for disturbance of a family burial place. Compare *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454. See "*Dead Bodies*," *Dec. Dig. (Key No.)* § 9.

proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument." In the same case the court also says: "There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act."

So, too, in some instances the right to recover for mental suffering has been recognized in cases where the physical impact was very slight—too slight, in fact, to result in any real physical injury.<sup>338</sup>

*Same—Mental Suffering Resulting in Physical Suffering*

One of the most important modifications of the general rule that mental suffering, not caused by or contemporaneous with physical injury, is not an element of damage, is to be found in those cases in which it has been held that, though the mental suffering was not caused by physical injury, if it is caused by a wrongful act, and is of itself the direct and proximate cause of bodily illness or suffering, it becomes a ground of action or a distinct element of damages. Thus, in a large number of jurisdictions in which the general rule is in force, and in which it is held as a necessary consequence that there can be no recovery for mere fright,<sup>339</sup> it is neverthe-

<sup>338</sup> Warren v. Boston & M. R. R., 163 Mass. 484, 40 N. E. 895; Porter v. Delaware, L. & W. R. Co., 73 N. J. Law, 405, 63 Atl. 860; Canning v. Inhabitants of Williamstown, 1 Cush. (Mass.) 451. But compare Hack v. Dady, 134 App. Div. 253, 118 N. Y. Supp. 906. See, also, Spade v. Lynn & B. R. Co., 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298. See "Damages," Dec. Dig. (Key No.) § 49; Cent. Dig. § 100.

<sup>339</sup> See ante, p. 143, and note 330.

less held that fright and mental suffering caused by a wrongful act is a distinct cause of action, if bodily illness and physical suffering results directly and proximately from the mental state, though there was no preceding or contemporaneous physical impact.<sup>240</sup>

<sup>240</sup> *Watson v. Dilts*, 116 Iowa, 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239; *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Kimberley v. Howland*, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545; *Yoakum v. Kroeger* (Tex. Civ. App.) 27 S. W. 953; *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617; *Bell v. Railway Co.*, L. R. 26 Ir. 428; *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Green v. T. A. Shuemaker & Co.*, 111 Md. 69, 73 Atl. 688, 23 L. R. A. (N. S.) 667; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Williamson v. Central of Georgia Ry. Co.*, 127 Ga. 125, 56 S. E. 119; *Gulf, C. & S. F. Ry. Co. v. Hayter* (Tex. Civ. App.) 55 S. W. 128; *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 Atl. 203, 9 L. R. A. (N. S.) 740; *Mack v. South Bound R. Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *St. Louis S. W. R. Co. of Texas v. Mitchell*, 25 Tex. Civ. App. 197, 60 S. W. 891.

In Minnesota a distinction is drawn between those cases in which the fright and consequent physical injury is caused by a legal wrong against the plaintiff as in *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, and those in which there was no legal wrong, as in *Sanderson v. Northern Pac. R. Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509. And see, also, *Buchanan v. West Jersey R. Co.*, 52 N. J. Law, 265, 19 Atl. 254.

The doctrine that fright is a distinct element of damages when the direct result thereof is bodily harm is, however, denied in the following cases: *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; *Hutchinson v. Stern*, 115 App. Div. 791, 101 N. Y. Supp. 145; *Hack v. Dady*, 134 App. Div. 253, 118 N. Y. Supp. 906; *Victorian Ry's Com'rs v. Coultas*, L. R. 13 App. Cas. 222; *Ewing v. Pittsburg, C. & St. L. Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; *Huston v. Freemansburg Borough*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49; *Haile's Curator v. Texas & P. R. Co.*, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Smith v. Postal Tel. Cable Co.*, 174 Mass. 576, 55 N. E. 380, 47 L. R. A. 323, 75 Am. St. Rep. 374; *Spade v. Lynn & B. R. Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393; *Id.*, 172 Mass. 488, 52

The theory on which most of these cases proceed is that the mental condition—fright—is but a link in the chain of causation, and that the physical result is really a direct and proximate effect of the wrongful act.<sup>341</sup> If it can be established that the bodily harm is a direct result of the mental condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced and is the proximate cause of such injury.<sup>342</sup>

But whatever view is taken of the right to recover for fright resulting in bodily harm, it is, of course, well settled that no recovery can be had for physical injury resulting from fright caused by another person's danger.<sup>343</sup>

N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298; *White v. Sander*, 168 Mass. 296, 47 N. E. 90; *Prescott v. Robinson*, 74 N. H. 460, 69 Atl. 522, 17 L. R. A. (N. S.) 594, 124 Am. St. Rep. 987; *Ward v. West Jersey & S. R. Co.*, 65 N. J. Law, 384, 47 Atl. 561; *Miller v. Baltimore & O. S. W. R. Co.*, 78 Ohio, 309, 85 N. E. 499, 18 L. R. A. (N. S.) 949, 125 Am. St. Rep. 699; *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577 (in which, however, the fright was caused by a joke, there being no violence or offer of violence, and the alleged physical result did not manifest itself until six weeks had elapsed). See, also, *Armour & Co. v. Kollmeyer*, 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. (N. S.) 110. And see *Norris v. Southern Ry., Carolina Division*, 84 S. C. 15, 65 S. E. 956. See "*Damages*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 100.

<sup>341</sup> *Purcell v. St. Paul City Ry.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; *Mack v. South Bound R. Co.*, 52 S. C. 322, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913. See "*Damages*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 100.

<sup>342</sup> *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Watson v. Dilts*, 116 Iowa, 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239; *Simone v. Rhode Island Co.*, 28 R. I. 186, 66 Atl. 202, 9 L. R. A. (N. S.) 745. See "*Damages*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 100.

<sup>343</sup> *Sanderson v. Northern Pac. R. Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509; *Bucknam v. Great Northern Ry. Co.*, 76 Minn. 373, 79 N. W. 98; *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134; *Cleveland, C., C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Fleming v. Label* (N. J. Sup.) 59 Atl. 28. See "*Damages*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 100.

*Mental Suffering in Actions for Torts*

Whatever may be the different opinions as to the right to recover for mental anguish as a distinct cause of action or element of damages, the rule is well settled in all jurisdictions that for mental suffering resulting from or accompanying a wrongful act causing material damage, and of which it is the natural proximate result, compensation may be recovered. It is to be noted that the expression used is "a wrongful act causing material damage." In many instances the statement of the rule is "wrongful act causing personal injury;" but, as pointed out,<sup>344</sup> the allowance of compensation for mental suffering is not confined to those cases in which there is actual personal injury, but is proper in any case where the plaintiff has suffered material damages. It may then be stated as a general rule that, whenever a wrong is committed which will support an action to recover some damages, compensation for mental suffering may also be recovered, if such suffering follows as a natural and proximate result.

The most common application of the rule is in actions for personal injuries. In such cases the damages should include an allowance for mental suffering in so far as it was attendant on the injury, and inseparably connected with it, or a natural result of it.<sup>345</sup> The actual extent of the injury makes no

<sup>344</sup> See A. G. Sedgwich, *Elements of the Law of Damages*, pp. 101, 102. See, also, *Lynch v. Knight*, 9 H. L. Cas. 577. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-55; *Cent. Dig.* § 100.

<sup>345</sup> *MCDERMOTT v. SEVERE*, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162, *Cooley, Cas. Damages*, 110; *Southern Pac. Co. v. Hetzer*, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; *Anthony v. Louisville & N. R. Co. (C. C.)* 27 Fed. 724; *Davidson v. Southern Pac. Co. (C. C.)* 44 Fed. 476; *Seger v. Town of Barkhamsted*, 23 Conn. 290; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 209, 9 South. 363; *St. Louis, I. M. & S. Ry. Co. v. Leamons*, 82 Ark. 504, 102 S. W. 363; *St. Louis, I. M. & S. Ry. Co. v. Buckner*, 89 Ark. 58, 115 S. W. 923, 20 L. R. A. (N. S.) 458; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Denver City Tramway Co. v. Martin*, 44 Colo. 24, 98 Pac. 836; *Masters v. Town of Warren*, 27 Conn. 293; *Atlanta & R. Air Line R. Co. v. Wood*, 48 Ga. 565; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Hannibal & St. J. R. Co.*



difference. If there is physical impact, though resulting in very slight or even no real injury, compensation for mental suffering naturally resulting will be allowed.<sup>246</sup> So, too, in

*v. Martin*, 111 Ill. 219; *City of Chicago v. McLeon*, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765; *City of Chicago v. Davies*, 110 Ill. App. 427; *Wabash & W. R. Co. v. Morgan*, 133 Ind. 430, 31 N. E. 661, 32 N. E. 85; *Town of Nappanee v. Ruckman*, 7 Ind. App. 361, 34 N. E. 609; *Pittsburg, C., C. & St. L. Ry. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301; *Kendall v. City of Albia*, 73 Iowa, 241, 34 N. W. 833; *Ferguson v. Davis Co.*, 57 Iowa, 601, 10 N. W. 906; *Rice v. City of Council Bluffs*, 124 Iowa, 639, 100 N. W. 506; *City of Salina v. Trosper*, 27 Kan. 544; *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451; *Canning v. Inhabitants of Williamstown*, 1 Cush. (Mass.) 451; *Tyler v. Powe-roy*, 8 Allen (Mass.) 480; *Kinney v. Folkerts*, 84 Mich. 616, 48 N. W. 283; *Porter v. Hannibal & St. J. R. Co.*, 71 Mo. 66, 36 Am. Rep. 454; *Butts v. National Exchange Bank*, 99 Mo. App. 168, 73 S. W. 1083; *Hosty v. Moulton Water Co.*, 39 Mont. 310, 103 Pac. 568; *American Water-Works Co. v. Dougherty*, 37 Neb. 373, 55 N. W. 1051; *Porter v. Delaware, L. & W. R. Co.*, 73 N. J. Law, 405, 63 Atl. 860; *Holyoke v. Grand Trunk Ry.*, 48 N. H. 541; *Britt v. Carolina Northern R. Co.*, 148 N. C. 37, 61 S. E. 601; *Matteson v. New York Cent. Ry. Co.*, 62 Barb. (N. Y.) 364; *Demann v. Eighth Ave. R. Co.*, 10 Misc. Rep. 191, 30 N. Y. Supp. 926; *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407; *Texas Mex. R. Co. v. Douglas*, 73 Tex. 325, 11 S. W. 333; *Fry v. Hillan* (Tex. Civ. App.) 37 S. W. 359; *Norfolk & W. R. Co. v. Marpole*, 97 Va. 594, 34 S. E. 462; *Richmond Passenger & Power Co. v. Robinson*, 100 Va. 394, 41 S. E. 719; *Sheel v. City of Appleton*, 49 Wis. 125, 5 N. W. 27, following *Goodno v. City of Oshkosh*, 28 Wis. 300. Mental suffering will be inferred from severe physical injury, without direct proof that such suffering ensued. *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288. Mental pain is not a distinct element of damage, in addition to or apart from bodily suffering. *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Joch v. Dankwardt*, 85 Ill. 331; *Galveston, H. & S. A. R. Co. v. Porfert*, 72 Tex. 344, 10 S. W. 207. Instructions approved. See *Haniford v. City of Kansas*, 103 Mo. 172, 15 S. W. 753; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110. See "*Damages*," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* § 100.

<sup>246</sup> *Canning v. Inhabitants of Williamstown*, 1 Cush. (Mass.) 451; *Warren v. Boston & M. R. Co.*, 163 Mass. 484, 40 N. E. 895; *Spade v. Lynn & B. R.*, 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298; *Porter v. Delaware, L. & W. R. Co.*, 73

such cases the compensation is not confined to the present mental anguish, but may include an allowance for such future mental suffering as is reasonably certain to follow.<sup>347</sup> But in all cases the mental suffering must be directly connected with the injury.<sup>348</sup> Mental suffering arising from extraneous causes, such as anxiety for the future of those dependent on the person injured, though brought into action by the injury, cannot be compensated.<sup>349</sup>

Compensation will also be allowed for mental suffering in

N. J. Law, 405, 63 Atl. 860. But compare *Hack v. Dady*, 134 App. Div. 253, 118 N. Y. Supp. 906. See "*Damages*," *Dec. Dig. (Key No.)* §§ 50, 52; *Cent. Dig.* § 100.

<sup>347</sup> *Matteson v. New York Cent. R. Co.*, 62 Barb. (N. Y.) 364; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *South & N. A. R. Co. v. McLendon*, 63 Ala. 266; *Campbell v. Pullman Palace-Car Co. (C. C.)* 42 Fed. 484; *Stewart v. City of Ripon*, 38 Wis. 584; *Spicer v. Railroad Co.*, 29 Wis. 580; *Sheel v. City of Appleton*, 49 Wis. 125, 5 N. W. 27; *Kendall v. City of Albia*, 73 Iowa, 241, 34 N. W. 833. In personal injury cases, damages may be recovered for grief and mortification which will be caused in the future by any serious deformity and disfigurement. *Heddles v. Chicago & N. W. R. Co.*, 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106; *Power v. Harlow*, 57 Mich. 107, 23 N. W. 606; *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; *Sherwood v. Chicago & N. W. R. Co.*, 82 Mich. 374, 46 N. W. 773; *Schmitz v. St. Louis, I. M. & S. R. Co.*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250. Contra, *Chicago, B. & Q. R. Co. v. Hines*, 45 Ill. App. 299; *Chicago, R. I. & P. R. Co. v. Caulfield*, 11 C. C. A. 552, 63 Fed. 396. Damages for dread of hydrophobia may be recovered by one who has been bitten by a dog. *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Warner v. Chamberlain*, 7 Houst. (Del.) 18, 30 Atl. 638. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-56, 102; *Cent. Dig.* §§ 100-105, 255-259.

<sup>348</sup> *Bahr v. Northern Pac. Ry. Co.*, 101 Minn. 314, 112 N. W. 267; *Gulf, C. & S. F. Ry. Co. v. Dickens* (Tex. Civ. App.) 118 S. W. 612; *Chicago City Ry. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-56; *Cent. Dig.* §§ 100-105.

<sup>349</sup> *Atchison, T. & S. F. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60; *Texas Mexican Ry. Co. v. Douglass*, 69 Tex. 694, 7 S. W. 77. And see *Keyes v. Minneapolis & St. L. Ry. Co.*, 36 Minn. 290, 30 N. W. 888. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-56; *Cent. Dig.* §§ 100-105.

actions for assault and battery,<sup>550</sup> false imprisonment,<sup>551</sup>

<sup>550</sup> *Bernadsky v. Erie R. Co.*, 76 N. J. Law, 580, 70 Atl. 189; *Randolph v. Hannibal & St. J. Ry. Co.*, 18 Mo. App. 609; *Boyle v. Case* (C. C.) 18 Fed. 880, 9 Sawy. 386; *Schelter v. York, Crabbe*, 449, Fed. Cas. No. 12,446; *West v. Forrest*, 22 Mo. 344; *Slater v. Rink*, 18 Ill. 527; *Gaither v. Blowers*, 11 Md. 536; *Fay v. Swan*, 44 Mich. 544, 7 N. W. 215; *Sloan v. Edwards*, 61 Md. 89; *GRO-NAN v. KUKKUCK*, 59 Iowa, 18, 12 N. W. 748, *Cooley, Cas. Damages*, 127; *Lucas v. Flinn*, 35 Iowa, 9; *Root v. Sturdivant*, 70 Iowa, 55, 29 N. W. 802; *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Barbee v. Reese*, 60 Miss. 906; *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624; *Morgan v. Curley*, 142 Mass. 107, 7 N. E. 726; *Smith v. Holcomb*, 99 Mass. 552; *Tatnall v. Courtney*, 6 Houst. (Del.) 434; *Smith v. Overby*, 30 Ga. 241; *Nossaman v. Rickert*, 18 Ind. 350; *Cox v. Vanderkleed*, 21 Ind. 164; *Wadsworth v. Treat*, 43 Me. 163; *Beck v. Thompson*, 31 W. Va. 459, 4 S. E. 447, 13 Am. St. Rep. 870; *Lunsford v. Walker*, 93 Ala. 36, 8 South. 386; *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *McIntyre v. Giblin*, 131 U. S. Append., clxxiv, 9 Sup. Ct. 698; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Townsend v. Briggs* (Cal.) 32 Pac. 307.

The damages recoverable for an indecent assault upon a woman include compensation for plaintiff's shock, fright, outraged feelings, anguish of mind, shame and humiliation, and loss of honor or good name. *Wolf v. Trinkle*, 103 Ind. 355, 3 N. E. 110; *Fay v. Swan*, 44 Mich. 544, 7 N. W. 215; *Alexander v. Blodgett*, 44 Vt. 476; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703; *Leach v. Leach*, 11 Tex. Civ. App. 699, 33 S. W. 703. See "*Assault and Battery*," *Dec. Dig. (Key No.)* § 38; *Cent. Dig.* § 53.

<sup>551</sup> *Jay v. Almy*, 1 Woodb. & M. 262, Fed. Cas. No. 7,236; *McCall v. McDowell*, *Deady*, 233, Fed. Cas. No. 8,673; *Catlin v. Pond*, 101 N. Y. 649, 5 N. E. 41; *Abrahams v. Cooper*, 81 Pa. 232; *Duggan v. Baltimore & O. R. Co.*, 159 Pa. 248, 28 Atl. 182, 186, 39 Am. St. Rep. 672; *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501; *Parsons v. Harper*, 16 Grat. (Va.) 64; *Stewart v. Maddox*, 63 Ind. 51; *Hays v. Creary*, 60 Tex. 445; *Taylor v. Davis* (Tex. Sup.) 13 S. W. 642; *Coffin v. Varila*, 8 Tex. Civ. App. 417, 27 S. W. 956; *Sorenson v. Dundas*, 50 Wis. 335, 7 N. W. 259; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Ball v. Horrigan*, 65 Hun. 621, 19 N. Y. Supp. 913; *Hewlett v. George*, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682. See "*False Imprisonment*," *Dec. Dig. (Key No.)* § 34; *Cent. Dig.* § 111.

malicious prosecution,<sup>352</sup> libel and slander,<sup>353</sup> seduction,<sup>354</sup>

<sup>352</sup> *Parkhurst v. Masteller*, 57 Iowa, 474, 10 N. W. 864; *Vinal v. Core*, 18 W. Va. 1; *Fisher v. Hamilton*, 49 Ind. 341; *Hogg v. Pinckney*, 16 S. C. 387; *Coleman v. Allen*, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; *Lavender v. Hudgens*, 32 Ark. 763; *Yount v. Carney*, 91 Iowa, 559, 60 N. W. 114; *Lunsford v. Dietrich*, 86 Ala. 250, 5 South. 461, 11 Am. St. Rep. 37; *McWilliams v. Hoban*, 42 Md. 56; *Malone v. Murphy*, 2 Kan. 250; *Fagnan v. Knox*, 40 N. Y. Super. Ct. 41; *Wheeler v. Hanson*, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408; *Shannon v. Jones*, 76 Tex. 141, 13 S. W. 477; *Williard v. Holmes, Booth & Haydens*, 2 Misc. Rep. 303, 21 N. Y. Supp. 998. See "*Malicious Prosecution*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 155, 156.

<sup>353</sup> In actions for defamation, if the words are not actionable per se, mental suffering alone will not render them actionable. *Prime v. Eastwood*, 45 Iowa, 640. But if the words are actionable per se, or if other special damage be shown to support the action, plaintiff's mental suffering may be compensated. *Shattuc v. McArthur (C. C.)* 29 Fed. 136; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Gomez v. Joyce (Super. Ct.)* 1 N. Y. Supp. 337; *Wilson v. Goit*, 17 N. Y. 442; *Samuels v. Evening Mail Ass'n*, 6 Hun, 5; *Hamilton v. Eno*, 16 Hun, 599; *Ward v. Dean*, 57 Hun, 585, 10 N. Y. Supp. 421; *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; *Mahoney v. Belford*, 132 Mass. 393; *Markham v. Russell*, 12 Allen (Mass.) 573, 90 Am. Dec. 169; *Hastings v. Stetson*, 130 Mass. 76; *Chesley v. Thompson*, 137 Mass. 136; *Austin v. Wilson*, 4 Cush. (Mass.) 273, 50 Am. Dec. 766; *Stallings v. Whittaker*, 55 Ark. 494, 18 S. W. 829; *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 24 Pac. 1051; *Swift v. Dickerman*, 31 Conn. 285; *Marble v. Chapin*, 132 Mass. 225; *McDougald v. Coward*, 95 N. C. 368; *Scripps v. Reilly*, 38 Mich. 10; *Newman v. Stein*, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447; *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561; *McQueen v. Fulgham*, 27 Tex. 463; *Zeliff v. Jennings*, 61 Tex. 458; *Adams v. Smith*, 58 Ill. 419; *Miller v. Roy*, 10 La. Ann. 231; *Dufort v. Abadie*, 23 La. Ann. 280; *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266; *Johnson v. Robertson*, 8 Port. (Ala.) 486. Such damages being compensatory, and not exemplary, malice is immaterial. *Warner v. Press Pub. Co.*, 132 N. Y. 181, 30 N. E. 393; *FARRAND v. ALDRICH*, 85 Mich. 593, 48 N. W. 628; *Cooley, Cas. Damages*, 126; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 119; *Cent. Dig.* § 347.

<sup>354</sup> *Garretson v. Becker*, 52 Ill. App. 255; *Lunt v. Philbrick*, 59 N. H. 59; *Phelin v. Kenderdine*, 20 Pa. 354; *Kendrick v. McCrary*, 11 Ga. 603; *Taylor v. Shelkett*, 66 Ind. 297; *Riddle v. McGinnis*,

and criminal conversation.<sup>355</sup> Damages for mental anguish may also be allowed in an action for abduction of a child.<sup>356</sup> However, in an action by a parent for injuries to his minor child, compensation for the parent's mental suffering will not be allowed.<sup>357</sup>

Under the statutes giving a right of action for injuries caused by the unlawful sale of intoxicating liquor, redress is usually given only for injury to the person, property, or means of support, and as a rule compensation for mental suffering is not allowed.<sup>358</sup> But where there is a cause of

<sup>355</sup> *W. Va.* 353; *Stevenson v. Belknap*, 6 *Iowa*, 97, 71 *Am. Dec.* 399; *Morgan v. Ross*, 74 *Mo.* 318; *Russell v. Chambers*, 31 *Minn.* 54, 16 *N. W.* 458. See "Damages," *Dec. Dig. (Key No.)* § 20; *Cent. Dig.* § 46.

<sup>356</sup> *Smith v. Meyers*, 52 *Neb.* 70, 71 *N. W.* 1006; *Matheis v. Mazet*, 164 *Pa.* 580, 30 *Atl.* 434. See "Husband and Wife," *Dec. Dig. (Key No.)* § 349; *Cent. Dig.* § 1134.

<sup>357</sup> *Magee v. Holland*, 27 *N. J. Law*, 86, 72 *Am. Dec.* 341; *Stowe v. Heywood*, 7 *Allen (Mass.)* 118. See "Abduction," *Cent. Dig.* § 29; "Damages," *Dec. Dig. (Key No.)* §§ 48-51; *Cent. Dig.* § 101.

<sup>358</sup> *Beebe v. Birmingham Ry. Light & Power Co.*, 140 *Ala.* 276, 37 *South.* 285, 103 *Am. St. Rep.* 33; *St. Louis Southwestern Ry. Co. v. Gregory (Tex. Civ. App.)* 73 *S. W.* 28; *Covington St. Ry. Co. v. Packer*, 72 *Ky.* 455, 15 *Am. Rep.* 725; *Cowden v. Wright*, 24 *Wend. (N. Y.)* 429, 35 *Am. Dec.* 633; *Brinkman v. St. Landry Cotton Oil Co.*, 118 *La.* 835, 43 *South.* 458; *Galveston v. Barbour*, 62 *Tex.* 172, 50 *Am. Rep.* 519; *Sperier v. Ott*, 116 *La.* 1087, 41 *South.* 323, 7 *L. R. A. (N. S.)* 518, 114 *Am. St. Rep.* 587 (malicious arrest of child). Contra, *Durkee v. Central Pac. R. Co.*, 56 *Cal.* 388, 38 *Am. Rep.* 59; *Trimble v. Spiller*, 7 *T. B. Mon. (Ky.)* 394, 18 *Am. Dec.* 189. The cases of *Pennsylvania R. Co. v. Kelly*, 31 *Pa.* 372, and *Oakland R. Co. v. Fielding*, 48 *Pa.* 320, apparently holding the contrary, proceed on the theory that mental suffering can never be compensated. *Black v. Carrollton R. Co.*, 10 *La. Ann.* 33, 63 *Am. Dec.* 586, and *Whitney v. Hitchcock*, 4 *Denio (N. Y.)* 461, went off on the notion that such damages were exemplary. See "Damages," *Dec. Dig. (Key No.)* §§ 48-55; *Cent. Dig.* §§ 100-105, 259.

<sup>359</sup> *Black, Intox. Liq.* § 309; *Mulford v. Clewell*, 21 *Ohio St.* 191; *Koerner v. Oberly*, 56 *Ind.* 224, 26 *Am. Rep.* 34; *Brantigan v. While*, 73 *Ill.* 561; *Freese v. Tripp*, 70 *Ill.* 496; *Flynn v. Fogarty*, 106 *Ill.* 263; *Kearney v. Fitzgerald*, 43 *Iowa*, 580; *Jackson v. Noble*, 54 *Iowa*, 641, 7 *N. W.* 88; *Welch v. Jugenheimer*, 56 *Iowa*, 11, 8 *N. W.* 673, 41 *Am. Rep.* 77; *Clinton v. Laning*, 61 *Mich.* 355, 28

action falling within the statute mental suffering connected therewith may be taken into account.<sup>359</sup>

While compensation for mental suffering alone cannot be recovered, where the same act that causes mental suffering also injures plaintiff in respect to a right protected by law, as in regard to his person, property, or reputation, the law, in redressing such injury, will also award to plaintiff a suitable compensation for his mental suffering, considered as an inseparable part of the general result of the tort against him;<sup>360</sup> that is to say, where the act complained of will itself support the action, compensation for mental suffering caused thereby may be included in the damages recoverable. The plaintiff, being entitled to some damage by reason of defendant's wrongful act, may recover all the damage arising from it.<sup>361</sup> Thus, in cases of assault,<sup>362</sup> or false im-

N. W. 125; *Johnson v. Schultz*, 74 Mich. 75, 41 N. W. 865; *Sissing v. Beach*, 99 Mich. 439, 58 N. W. 364. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-54; *Cent. Dig.* §§ 100-104; "*Intoxicating Liquors*," *Dec. Dig.* § 312; *Cent. Dig.* § 455.

<sup>359</sup> *Bailey v. Briggs*, 143 Mich. 303, 106 N. W. 863; *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485; *Friend v. Dunks*, 37 Mich. 25; *Peterson v. Knoble*, 35 Wis. 80; *Rodley v. Seider*, 99 Mich. 431, 58 N. W. 366. In *Ward v. Thompson*, 48 Iowa, 588, there was an assault and other personal wrongs. See, also, *Kear v. Garrison*, 13 Ohio Cir. Ct. R. 447, 7 O. C. D. 515. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-54; *Cent. Dig.* §§ 100-104; "*Intoxicating Liquors*," *Dec. Dig.* § 312; *Cent. Dig.* § 455.

<sup>360</sup> *Lynch v. Knight*, 9 H. L. Cas. 577; *Trigg v. St. Louis, K. C. & N. R. Co.*, 74 Mo. 147, 41 Am. Rep. 305; *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; *SUMMERFIELD v. WESTERN UNION TEL. CO.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17; *Cooley, Cas. Damages*, 123. A wife may recover for mental anguish, mortification, and injured feelings caused by the alienation of her husband's affections, without showing actual loss of support. *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-56; *Cent. Dig.* §§ 100-105, 255-259.

<sup>361</sup> *Chapman v. Telegraph Co.*, 90 Ky. 265, 13 S. W. 880. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-56; *Cent. Dig.* §§ 100-105, 255-259.

<sup>362</sup> *Wolf v. Trinkle*, 103 Ind. 355, 3 N. E. 110; *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397; *Leach v. Leach*, 11 Tex. Civ. App. 699, 33 S. W. 703; *GODDARD v. GRAND TRUNK R. OF*

prisonment,<sup>363</sup> where plaintiff was not actually touched, substantial damages may be recovered, though the entire injury is necessarily mental.

The wrongful ejection of a passenger from a public conveyance is not only a breach of contract, but also a tort, in an action for which compensation for mental suffering, humiliation, and insult may be recovered,<sup>364</sup> though there was

CANADA, 57 Me. 202, 2 Am. Rep. 39, Cooley, Cas. Damages, 190; Handy v. Johnson, 5 Md. 450; Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373; Alexander v. Blodgett, 44 Vt. 476. Compare Reed v. Maley, 115 Ky. 816, 74 S. W. 1079, 62 L. R. A. 900. See "Damages," *Dec. Dig. (Key No.)* §§ 48-55; *Cent. Dig.* §§ 100-105; "Assault and Battery," *Dec. Dig.* § 38; *Cent. Dig.* § 53.

<sup>363</sup> Hewlett v. George, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682; Fotheringham v. Adams Exp. Co. (C. C.) 36 Fed. 252, 1 L. R. A. 474; Courtoy v. Dozier, 20 Ga. 369; Hawk v. Ridgway, 33 Ill. 473; Bissell v. Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Mead v. Young, 19 N. C. 521. See "Damages," *Dec. Dig. (Key No.)* §§ 48-55; *Cent. Dig.* §§ 100-105; "False Imprisonment," *Dec. Dig.* § 34; *Cent. Dig.* § 111.

<sup>364</sup> Coppin v. Braithwaite, 8 Jur. 875; Gallena v. Hot Springs R. Co. (C. C.) 13 Fed. 116; Murphey v. Western & A. R. Co. (C. C.) 23 Fed. 637; Quigley v. Central Pac. R. Co., 5 Sawy. 107, Fed. Cas. No. 11,510; Id., 11 Nev. 350, 21 Am. Rep. 757; McKinley v. Chicago & N. W. R. Co., 44 Iowa, 314, 24 Am. Rep. 748; Shepard v. Chicago, R. I. & P. R. Co., 77 Iowa, 54, 41 N. W. 564; Carsten v. Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. Rep. 589; Hoffman v. Northern Pac. R. Co., 45 Minn. 53, 47 N. W. 312; Serwe v. Northern Pac. R. Co., 48 Minn. 78, 50 N. W. 1021; Perry v. Pittsburgh Union Pass. R. Co., 153 Pa. 236, 25 Atl. 772; Baltimore & O. R. Co. v. Bambrey (Pa.) 16 Atl. 67; Hays v. Houston G. N. R. Co., 46 Tex. 272; International & G. N. R. Co. v. Smith (Tex. Sup.) 1 S. W. 565; International & G. N. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491, 2 Am. St. Rep. 515; Pennsylvania R. Co. v. Spicker, 105 Pa. 142; Taber v. Hutson, 5 Ind. 322, 61 Am. Dec. 96; Toledo, W. & W. R. Co. v. McDonough, 53 Ind. 289; Lake Erie & W. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Chicago, St. L. & P. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. 837; Chicago & N. W. R. Co. v. Chisholm, 79 Ill. 584; Chicago & N. W. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; Lake Erie & W. R. Co. v. Christison, 39 Ill. App. 495; Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; Little Rock & F. S. R. Co. v. Dean, 43 Ark. 529, 51 Am. Rep. 584; Georgia R. Co. v. Homer, 73 Ga. 251; Head v. Georgia Pac. R. Co., 79 Ga. 358, 7 S. E. 217, 11 Am. St.

no physical injury.<sup>365</sup>

At common law there was no property in a corpse; and therefore compensation could not be recovered for mental suffering caused by indignities offered to the remains of a near relative.<sup>366</sup> But where defendant trespassed on plaintiff's burial lot, and disturbed the remains of his child, it was held that damages for mental suffering could be recovered

Rep. 434; *Wilsey v. Louisville & N. R. Co.*, 83 Ky. 511; *Louisville & N. R. Co. v. Whitman*, 79 Ala. 328; *Smith v. Pittsburg, Ft. W. & C. R. Co.*, 23 Ohio St. 10; *Hagan v. Providence & W. R. Co.*, 3 R. I. 88, 62 Am. Dec. 377; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; *GODDARD v. GRAND TRUNK R. OF CANADA*, 57 Me. 202, 2 Am. Rep. 39, *Cooley, Cas. Damages*, 190; *Allen v. Camden & P. Steamboat Ferry Co.*, 46 N. J. Law, 198; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25. A person seeking passage in a particular car on a railroad train, who is excluded therefrom on account of her color alone, may recover for the indignity, vexation, and disgrace to which she has been subjected. *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641. Where the ejection was in good faith, and without violence, insult, or malice, the authorities are divided as to whether compensation can be recovered for mental suffering. The question was answered in the negative in *Dorrah v. Illinois Cent. R. Co.*, 65 Miss. 14, 3 South. 36, 7 Am. St. Rep. 629; *Illinois Cent. R. Co. v. Sutton*, 53 Ill. 397; *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157; *Finch v. Northern Pac. R. Co.*, 47 Minn. 36, 49 N. W. 329; *Houston City St. R. Co. v. Jageman* (Tex. Civ. App.) 23 S. W. 628; and in the affirmative by *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Chicago & E. I. R. Co. v. Conley*, 6 Ind. App. 9, 32 N. E. 96, 865; *Curtis v. Sioux City & H. P. R. Co.*, 87 Iowa, 622, 54 N. W. 339; *Wilson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146. Where the passenger was put down at an improper place, damages may be recovered for mental suffering, if a natural and proximate consequence. *Stutz v. Chicago & N. W. R. Co.*, 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769; *Missouri Pac. R. Co. v. Kaiser*, 82 Tex. 144, 18 S. W. 305. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 382, 416; *Cent. Dig.* §§ 1487, 1597.

<sup>365</sup> *Indiana Ry. Co. v. Orr*, 41 Ind. App. 426, 84 N. E. 32. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 382, 416; *Cent. Dig.* §§ 1487, 1597.

<sup>366</sup> 2 Bl. Comm. 429; *Foster v. Dodd*, 8 Best & S. 842; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667. See "*Dead Bodies*," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* §§ 13, 14.



in an action of *quare clausum fregit*,<sup>367</sup> because the trespass was sufficient to support the action. And in an Alabama case the unlawful removal of the body of plaintiff's child from the cemetery was regarded as a proper action in which to allow compensation for injured feelings.<sup>368</sup> In *Larson v. Chase*<sup>369</sup> the supreme court of Minnesota allowed a recovery for mental suffering alone, no other loss or injury being shown, where there had been an unlawful mutilation and dissection of the body of plaintiff's husband. In a later case in the same jurisdiction a recovery for mental suffering was allowed where a carrier, transporting a corpse, negligently left the box out in the rain, whereby the casket was soiled and the body disfigured.<sup>370</sup>

Compensation for mental suffering is often refused because such suffering is not a proximate result of the injury. Thus, where a personal injury causes a miscarriage, damages for mental suffering attending the miscarriage may be recovered, but grief for the loss of the child is too remote.<sup>371</sup> Mental suffering as the result of the wrongful refusal of a bank to honor plaintiff's check was considered too remote.<sup>372</sup> And

<sup>367</sup> *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. Compare *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454. See "*Dead Bodies*," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* §§ 13, 14.

<sup>368</sup> *Bessemer Land & Improvement Co. v. Jenkins*, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26. See "*Damages*," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* § 14.

<sup>369</sup> *LARSON v. CHASE*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, *Cooley, Cas. Damages*, 107. To the same effect, see *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956. See "*Damages*," *Dec. Dig.* § 103; "*Dead Bodies*," *Dec. Dig.* § 9.

<sup>370</sup> *Lindt v. Great Northern Ry. Co.*, 99 Minn. 408, 109 N. W. 823, 7 L. R. A. (N. S.) 1018. See "*Damages*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* §§ 100-105.

<sup>371</sup> *Bovee v. Town of Danville*, 53 Vt. 183; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; *City of Chicago v. McLean*, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765; *Tunncliffe v. Bay Cities Consol. R. Co.*, 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-53; *Cent. Dig.* §§ 100-105, 255-259.

<sup>372</sup> *American Nat. Bank v. Morey*, 113 Ky. 857, 69 S. W. 759, 58 L. R. A. 986, 101 Am. St. Rep. 379. See "*Damages*," *Dec. Dig. (Key No.)* § 54; *Cent. Dig.* § 100.

where by reason of a boycott plaintiff was unable to procure a hearse for the funeral of his child, compensation for mental suffering was denied.<sup>373</sup>

*Same—Injury to Property*

Compensation for mental suffering is not usually an element of damage in actions of tort for injuries to property.<sup>374</sup> Mental suffering is not usually a natural or proximate consequence of that class of torts.<sup>375</sup> Hence the right to recover for mental suffering has been denied in actions of forcible entry and detainer,<sup>376</sup> and where property was obtained by duress of threats.<sup>377</sup> So, too, the right has been denied in case of a seizure and detention of personal property,<sup>378</sup> and in a conversion of goods by a carrier by refusal to deliver the goods until certain claims for charges were paid.<sup>379</sup>

On the other hand, where a tenant was wrongfully evicted, it was held that he could recover for mental suffering at having his family turned into the street.<sup>380</sup> Damages for

<sup>373</sup> *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1. See "Damages," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* §§ 50-55.

<sup>374</sup> *Owsley v. Fowler* (Ky.) 104 S. W. 762; *Gulf, C. & S. F. Ry. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866; *Lambert v. City of Norfolk*, 108 Va. 259, 61 S. E. 776, 17 L. R. A. (N. S.) 1061, 128 Am. St. Rep. 945. See "Damages," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* § 100.

<sup>375</sup> *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454. Mental anguish experienced by a prospective groom on the damaging by a carrier of the trousseau of the prospective bride is too remote. *Eller v. Carolina & N. W. Ry. Co.*, 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225. See "Damages," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* § 100.

<sup>376</sup> *Anderson v. Taylor*, 56 Cal. 131, 38 Am. Rep. 52. See "Damages," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* § 100.

<sup>377</sup> *Wulstein v. Mohlman*, 5 N. Y. Supp. 569. See "Damages," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* § 100.

<sup>378</sup> *Chappell v. Ellis*, 123 N. C. 359, 31 S. E. 709, 68 Am. St. Rep. 822. See "Damages," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* § 100.

<sup>379</sup> *Gates v. Bekins*, 44 Wash. 422, 87 Pac. 505. See "Damages," *Dec. Dig. (Key No.)* §§ 48, 55; *Cent. Dig.* § 100.

<sup>380</sup> *Moyer v. Gordon*, 113 Ind. 282, 14 N. E. 476; *Fillebrown v. Hoar*, 124 Mass. 580; *State v. Weincl*, 13 Mo. App. 583; *McClure*

mental suffering have also been allowed in actions for taking property under an unlawful search warrant,<sup>381</sup> and for suing out a vexatious attachment.<sup>382</sup> So, too, where plaintiff's right to employment was interfered with by malicious threats of a labor union, compensation for mental suffering was allowed.<sup>383</sup> And damages for mental suffering have been allowed in an action for malicious abuse of plaintiff's horse.<sup>384</sup>

### *Mental Suffering in Actions of Contract*

On the question whether compensation for mental suffering can be recovered in actions for breach of contract, the authorities are in conflict. The general rule undoubtedly is that mental suffering alone is not an element of damages in breach of contract.<sup>385</sup> But it is the rule in several jurisdictions that

v. Campbell, 42 Wash. 252, 84 Pac. 825. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-55; *Cent. Dig.* §§ 100-105; "*Landlord and Tenant*," *Dec. Dig. (Key No.)* § 180; *Cent. Dig.* § 723.

<sup>381</sup> Melcher v. Scruggs, 72 Mo. 406. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-55; *Cent. Dig.* §§ 100-105.

<sup>382</sup> City Nat. Bank v. Jeffries, 73 Ala. 183; Byrne v. Gardner, 33 La. Ann. 6. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-55; *Cent. Dig.* §§ 100-105.

<sup>383</sup> Carter v. Oster, 134 Mo. App. 146, 112 S. W. 995. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-55; *Cent. Dig.* §§ 100-105.

<sup>384</sup> Kimball v. Holmes, 60 N. H. 163. But see Buchanan v. Stout, 123 App. Div. 648, 108 N. Y. Supp. 38, where plaintiff's cat was mangled by defendant's dog. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-55; *Cent. Dig.* §§ 100-105.

<sup>385</sup> Wilcox v. Richmond & D. R. Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; Southwestern Telegraph & Telephone Co. v. Solomon (Tex. Civ. App.) 117 S. W. 214; Beaulieu v. Great Northern Ry. Co., 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564; MENTZER v. WESTERN UNION TEL. CO., 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294; Cooley, *Cas. Damages*, 115; Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507; Shellabarger v. Morris, 115 Mo. App. 566, 91 S. W. 1005; McBride v. Sunset Telephone Co. (C. C.) 96 Fed. 81. But see Lewis v. Holmes, 109 La. 1030, 34 South. 66, 61 L. R. A. 274, where it was held that in computing the damages for breach of contract of a fashionable milliner to furnish the trousseau of a bride, the court will consider, not only the disappointment of the bride in not having the dresses in time for the wedding and her mortification in going to her

mental suffering may be compensated for in actions for breach of contract, when a right of action exists independent of the mental anguish,<sup>386</sup> or the breach of contract amounts in effect to an independent willful tort.<sup>387</sup> It would seem, too, that such damages should be recoverable on principle, when other than merely pecuniary benefits are in contemplation,<sup>388</sup> as where the offending party has had notice of the peculiar circumstances,<sup>389</sup> subject, of course, to the general limitation that, mental anguish is a proximate, direct, and natural result of the breach.<sup>390</sup>

Undoubtedly, the great majority of contracts are made solely to secure something having a definite or recognized pecuniary value; and in such cases mental suffering would be

husband unprovided for, but also her inability by reason of lack of the dresses to attend entertainments planned in her honor on her wedding tour. See "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 104, 105.

<sup>386</sup> *Western Union Tel. Co. v. Northcott*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *Western Union Tel. Co. v. Proctor*, 6 Tex. Civ. App. 300, 25 S. W. 811. See "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 104, 105.

<sup>387</sup> *Beaulieu v. Great Northern Ry. Co.*, 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564. See "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 104, 105.

<sup>388</sup> *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249; *WRIGHT v. BEARDSLEY*, 46 Wash. 16, 89 Pac. 172, *Cooley, Cas. Damages*, 112. See "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 104, 105.

<sup>389</sup> *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; *Wells, Fargo & Co.'s Exp. v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412. See "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 104, 105.

<sup>390</sup> *St. Louis, I. M. & S. R. Co. v. Bragg*, 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206; *Buenzle v. Newport Amusement Ass'n*, 29 R. I. 23, 68 Atl. 721, 14 L. R. A. (N. S.) 1242; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385. But compare *Ricketts v. Western Union Tel. Co.*, 10 Tex. Civ. App. 226, 30 S. W. 1105; *De Voegeler v. Western Union Tel. Co.*, 10 Tex. Civ. App. 229, 30 S. W. 1107. See "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 104, 105.

excluded as an element of damage, not only because not within the contemplation of the parties,<sup>391</sup> but also because not a natural or contemplated consequence of a breach.<sup>392</sup> But not all contracts are made for pecuniary benefits; and, "where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to the ascertainment of damages flowing from the breach."<sup>393</sup> Thus, the breach of a promise of marriage has always been regarded as an exception, and damages for mental suffering allowed.<sup>394</sup> For

<sup>391</sup> *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507. See "*Damages*," *Dec. Dig.* (Key No.) § 56; *Cent. Dig.* §§ 104, 105.

<sup>392</sup> In the following cases mental suffering has been held too remote or unexpected to be compensated. *Beasley v. Western Union Tel. Co.* (C. C.) 39 Fed. 181; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439; *Same v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. 148; *Gulf, C. & S. F. R. Co. v. Hurley*, 74 Tex. 593, 12 S. W. 226; *Western Union Tel. Co. v. Linn* (Tex. Civ. App.) 23 S. W. 895; *Id.*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *Same v. Motley*, 87 Tex. Sup. 38, 27 S. W. 52; *Same v. Stone* (Tex. Civ. App.) 27 S. W. 144; *Same v. Andrews*, 78 Tex. 305, 14 S. W. 641; *Wells, Fargo & Co.'s Exp. v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. 412; *Nichols v. Eddy* (Tex. Civ. App.) 24 S. W. 316; *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Ikard v. Telegraph Co.* (Tex. Civ. App.) 22 S. W. 534; *Pullman Palace Car Co. v. Fowler*, 6 Tex. Civ. App. 755, 27 S. W. 268; *Pullman Palace Car Co. v. McDonald*, 2 Tex. Civ. App. 322, 21 S. W. 945; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 13 S. E. 427. In an action against an express company for failure to deliver promptly medicines shipped for the use of plaintiff's sick wife, damages for sympathetic mental suffering of the husband on account of the pain of his wife are too remote. *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. 830. See "*Damages*," *Dec. Dig.* (Key No.) § 256; *Cent. Dig.* §§ 104, 105.

<sup>393</sup> *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 703, 8 S. W. 574, 6 Am. St. Rep. 864. See "*Damages*," *Dec. Dig.* (Key No.) § 56; *Cent. Dig.* §§ 104, 105.

<sup>394</sup> *Collins v. Mack*, 31 Ark. 684; *Sherman v. Rawson*, 102 Mass. 395, 399; *Reed v. Clark*, 47 Cal. 194; *Sauer v. Schulenberg*, 33 Md. 288, 3 Am. Rep. 174; *Wilds v. Bogan*, 57 Ind. 453; *Baldy v. Stratton*, 11 Pa. 316; *Chesley v. Chesley*, 10 N. H. 327; *Wilbur v. Johnson*, 58 Mo. 600; *Bird v. Thompson*, 96 Mo. 424, 9 S. W. 788; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Johnson v. Jenkins*, 24 N. Y. 252; *Musselman v. Barker*, 26 Neb. 737, 42 N. W. 759; *Thorn v.*

breach of an undertaker's contract to keep safely the body of plaintiff's deceased child, it was held that damages could be recovered for mental anguish.<sup>395</sup> So, too, where there was a breach of contract to bury a child in a proper manner, damages for mental anguish were allowed.<sup>396</sup>

Damages for mental anguish have also been allowed for breach of contract to transport a corpse.<sup>397</sup> On the other hand, for the breach of the ordinary contract of carriage, the general rule is that, in the absence of any elements of a tortious nature, damages for mental suffering will not be allowed.<sup>398</sup>

- Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Harrison v. Swift, 13 Allen (Mass.) 144; Giese v. Schultz, 53 Wis. 462, 10 N. W. 598; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936. See "Damages," Dec. Dig. (Key No.) § 56; Cent. Dig. §§ 104, 105; "Breach of Marriage Promise," Dec. Dig. (Key No.) § 26; Cent. Dig. §§ 38, 39.
- <sup>395</sup> Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249. See "Damages," Dec. Dig. (Key No.) § 56; Cent. Dig. §§ 104, 105; "Dead Bodies," Dec. Dig. (Key No.) § 9.
- <sup>396</sup> WRIGHT v. BEARDSLEY, 46 Wash. 16, 89 Pac. 172, Cooley, Cas. Damages, 112. Compare J. E. Dunn & Co. v. Smith (Tex. Civ. App.) 74 S. W. 576 (breach of contract to furnish coffin). See "Damages," Dec. Dig. (Key No.) § 56; Cent. Dig. §§ 104, 105; "Dead Bodies," Dec. Dig. (Key No.) § 9.
- <sup>397</sup> Hale v. Bonner, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850. But see Wells, Fargo & Co.'s Exp. v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412, where the contract was made in the name of A. to transport the corpse of his son, and it was held that there could be no recovery for mental anguish of the mother, not a party to the contract, and whose existence was not known to the express company. See, also, Beaulieu v. Great Northern Ry. Co., 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564, where the breach was due to simple negligence and recovery was refused. See "Damages," Dec. Dig. (Key No.) § 56; Cent. Dig. §§ 104, 105; "Dead Bodies," Dec. Dig. (Key No.) § 9.
- <sup>398</sup> TURNER v. GREAT NORTHERN RY., 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883, Cooley, Cas. Damages, 105; St. Louis, I. M. & S. R. Co. v. Bragg, 69 Ark. 402, 64 S. W. 226, 36 Am. St. Rep. 206; Smith v. Wilmington & W. R. Co., 130 N. C. 304, 41 S. E. 481; Kansas City, Ft. S. & M. R. Co. v. Dalton, 65 Kan. 661, 70 Pac. 645; Walsh v. Chicago M. & St. P. R. Co., 42 Wis. 23, 24 Am. Rep. 376; Trigg v. St. Louis, K. C. & N. Ry. Co.,

*Same—Failure of Telegraph Company to Deliver Message*

Actions against telegraph companies for delay or failure to deliver messages constitute by far the most numerous class of cases in which the question of the right to recover damages for mental anguish on breach of contract has been raised. In the case of *So Relle v. Western Union Tel. Co.*<sup>399</sup> the supreme court of Texas announced the doctrine that the addressee of a telegram could recover as compensatory damages for mental anguish due to the failure of the telegraph company to deliver promptly a message announcing the death of his mother, by reason of which he was prevented from attending the funeral. Though the doctrine was subsequently repudiated in *Gulf, C. & S. F. R. Co. v. Levy*,<sup>400</sup> the Texas Court reaffirmed the rule in *Stuart v. Western Union Tel. Co.*,<sup>401</sup> and it is now well established in Texas that, where the nature of the message is such as to apprise the company that mental suffering will result from delay or failure to transmit it, compensation for such suffering can be recovered though not connected with any physical injury or pecuniary loss.<sup>402</sup>

74 Mo. 147, 41 Am. Rep. 305. Contra: *East Tennessee V. & G. R. Co. v. Lockhart*, 79 Ala. 315; *Cleveland, C., C. & St. L. R. Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. Rep. 245; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Texas & Pac. Ry. Co. v. Armstrong*, 93 Tex. 31, 51 S. W. 835. See "*Carriers*," *Dec. Dig. (Key No.)* § 135; "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 104, 105.

<sup>399</sup> 55 Tex. 308, 40 Am. Rep. 805. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>400</sup> 59 Tex. 563, 46 Am. Rep. 278. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>401</sup> 86 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>402</sup> *Loper v. Telegraph Co.*, 70 Tex. 689, 8 S. W. 600; *Western Union Tel. Co. v. Broesche*, 73 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *Same v. Rosentreter*, 80 Tex. 406, 16 S. W. 25; *Western Union Tel. Co. v. Nations*, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914; *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *Western Union Tel. Co. v. Proctor*, 6 Tex. Civ. App. 300, 25 S. W. 811; *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *Western Union Tel. Co.*

The "Texas doctrine" has been adopted and followed in Alabama, Iowa, Kentucky, North Carolina, and Tennessee,<sup>408</sup> and in Arkansas and South Carolina by virtue of statute.<sup>404</sup>

v. Hawkins (Tex. Civ. App.) 110 S. W. 543; Western Union Tel. Co. v. DeAudrea, 45 Tex. Civ. App. 395, 100 S. W. 977; Western Union Tel. Co. v. Parsley (Tex. Civ. App.) 121 S. W. 226 (applying Arkansas Statute); Western Union Tel. Co. v. Olivarri (Tex. Civ. App.) 110 S. W. 930. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>408</sup>Alabama—Western Union Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; Same v. Cunningham, 99 Ala. 314, 14 South. 579; Western Union Tel. Co. v. Long, 148 Ala. 202, 41 South. 965; Western Union Tel. Co. v. McMorris, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; Western Union Tel. Co. v. Northcutt, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; Western Union Tel. Co. v. Hill, 163 Ala. 18, 50 South. 248, 23 L. R. A. (N. S.) 648. Compare Western Union Tel. Co. v. Jackson, 163 Ala. 9, 50 South. 316, where it is said that there must be allegation of other items of loss besides mere mental anguish. Iowa—MENTZER v. WESTERN UNION TEL. CO., 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294, Cooley, Cas. Damages, 115; Cowan v. Western Union Tel. Co., 122 Iowa, 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; Foreman v. Western Union Tel. Co., 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374. Kentucky—Chapman v. Telegraph Co., 90 Ky. 265, 13 S. W. 880; Thurman v. Western Union Tel. Co., 127 Ky. 137, 105 S. W. 155, 14 L. R. A. (N. S.) 499. North Carolina—Young v. Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883; Thompson v. Western Union Tel. Co., 107 N. C. 449, 12 S. E. 427; Sherill v. Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429; Bright v. Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841; Hancock v. Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; Cates v. Western Union Tel. Co., 151 N. C. 497, 66 S. E. 592, 24 L. R. A. (N. S.) 1286. Tennessee—Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>404</sup>Arkansas—Western Union Tel. Co. v. Blockmer, 82 Ark. 526, 102 S. W. 366; Arkansas & L. Ry. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760. South Carolina—Talbert v. Western Union Tel. Co., 83 S. C. 68, 64 S. E. 862, 916; Fail v. Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697, 61 S. E. 258.

There cannot be a recovery against the operator personally. Fail v. Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697, 61 S. E. 258.

In Arkansas the doctrine has, in view of the statute, been ex-



Indiana also adopted the rule,<sup>405</sup> but the supreme court of that state has since overruled the Reese Case and repudiated the doctrine.<sup>406</sup>

On the other hand, in most of the other states the courts have repudiated the doctrine,<sup>407</sup> and the federal courts have refused to follow it.<sup>408</sup>

tended to telegrams intended to relieve the anxiety of the addressee. *Western Union Tel. Co. v. Hollingsworth*, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. (N. S.) 497, 119 Am. St. Rep. 105. But contra, see *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, 12 S. W. 534; *Sparkman v. Western Union Tel. Co.*, 130 N. C. 447, 41 S. E. 881. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>405</sup> *Reese v. Telegraph Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; *Western Union Tel. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>406</sup> *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846. See "*Telegraphs and Telephones*" *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>407</sup> *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; *Russell v. Western Union Tel. Co.*, 3 Dak. 315, 19 N. W. 408; *Connell v. Telegraph Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 173, 38 Am. St. Rep. 575; *Newman v. Western Union Tel. Co.*, 54 Mo. App. 434; *Kester v. Western Union Tel. Co.*, 8 Ohio Cir. Ct. R. 236; *SUMMERFIELD v. WESTERN UNION TEL. CO.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17; *Cooley, Cas. Damages*, 122; *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; *Francis v. Same*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507; *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810; *Glenn v. Western Union Tel. Co.*, 1 Ga. App. 821, 58 S. E. 83; *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846, overruling *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>408</sup> *Chase v. Western Union Tel. Co. (C. C.)* 44 Fed. 554, 10 L. R. A. 464; *Crawson v. Western Union Tel. Co. (C. C.)* 47 Fed. 544; *Tyler v. Western Union Tel. Co. (C. C.)* 54 Fed. 634; *Kester v. Same (C. C.)* 55 Fed. 603; *Western Union Tel. Co. v. Wood*, 6 C. C. A. 432, 57 Fed. 471, 21 L. R. A. 706; *Gahan v. Western Union Tel. Co. (C. C.)* 59 Fed. 433; *Rowan v. Western Union Tel. Co. (C. C.)* 149 Fed. 550. But see *Beasley v. Western Union Tel.*

When it is once conceded that an allowance for mental suffering is proper in any case, it is difficult to see what there is in the nature of a contract to prevent an allowance for such sufferings, where they are a proximate and contemplated consequence of a breach. Even a technical breach of contract, whether followed by damage or not, will support an action. The party is entitled to nominal damages, at least. This being so, it follows, as in cases of torts, that the entire damage, including compensation for mental suffering, may be recovered. If damages for mental suffering in cases of tort were confined to cases where mental suffering is an element or necessary consequence of physical pain, there would be some reason in denying such damages in an action of contract. But, so long as mental suffering is considered a proper element of damage in actions for injuries to property or reputation, no sound reason can be given for denying a recovery of such damages in actions of contract.<sup>409</sup>

Though there is some confusion and conflict in the application of the doctrine in the cases which allow recovery for mental anguish, certain fairly well established rules can be discovered in the cases. It is recognized that mental anguish can be compensated for only when it could reasonably be anticipated to follow default on the part of the company,<sup>410</sup> or the circumstances are such as to bring home notice to the company that mental anguish would result from its default.<sup>411</sup>

Co. (C. C.) 39 Fed. 181. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>409</sup> See note in *Western Union Tel. Co. v. Coggin*, 15 C. C. A. 235, 68 Fed. 137, "Damages in Actions against Telegraph Companies." See, also, *Lynch v. Knight*, 9 H. L. Cas. 577.

<sup>410</sup> *Lyles v. Western Union Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 13 L. R. A. (N. S.) 534; *Western Union Tel. Co. v. Blockmer*, 82 Ark. 526, 102 S. W. 366. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>411</sup> *Todd v. Western Union Tel. Co.*, 77 S. C. 522, 58 S. E. 433; *Lyles v. Western Union Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 13 L. R. A. (N. S.) 534; *Toale v. Western Union Tel. Co.*, 76 S. C. 248, 57 S. E. 117; *Western Union Tel. Co. v. Butler*, 45 Tex. Civ. App. 28, 99 S. W. 704; *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 24 S. W. 490, 47 Am. St. Rep. 58; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; *Western Union Tel. Co. v.*

Moreover, the mental anguish must be the natural and proximate result of the failure to deliver the telegram.<sup>412</sup>

In order that there shall be any presumption of mental anguish because of delay or failure to deliver telegrams relating to sickness or death, there must be very close relationship, either that of husband and wife or relationship by blood.<sup>413</sup> Where the relationship is merely by affinity, mental suffering will not be presumed, but must be proved.<sup>414</sup>

Olivarri (Tex. Civ. App.) 110 S. W. 930. As to what is sufficient to charge the company with notice that mental suffering will result from failure to promptly deliver the message, see *Western Union Tel. Co. v. Brown*, 71 Tex. 723, 10 S. W. 323, 2 L. R. A. 766, overruled in *Same v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Same v. Moore*, 76 Tex. 66, 12 S. W. 949, 18 Am. St. Rep. 25; *Same v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Same v. Feegles*, 75 Tex. 537, 12 S. W. 860; *Same v. Kirkpatrick*, 76 Tex. 27, 13 S. W. 70, 18 Am. St. Rep. 37; *Potts v. Western Union Tel. Co.*, 82 Tex. 545, 18 S. W. 604; *Western Union Tel. Co. v. Ward* (Tex. App.) 19 S. W. 898; *Same v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. 688; *Id.*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Western Union Tel. Co. v. Olivarri* (Tex. Civ. App.), 110 S. W. 930; *Reese v. Western Union Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>412</sup> *Western Union Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; *Lyles v. Western Union Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>413</sup> *Western Union Tel. Co. v. Blockmer*, 82 Ark. 526, 102 S. W. 366; *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *Western Union Tel. Co. v. McMorris*, 158 Ala. 563, 48 South. 349, 132 Am. St. Rep. 46; *Foreman v. Western Union Tel. Co.*, 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; *Western Union Tel. Co. v. Prevatt*, 149 Ala. 617, 43 South. 106. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>414</sup> *Butler v. Western Union Tel. Co.*, 77 S. C. 148, 57 S. E. 757; *Johnson v. Western Union Tel. Co.*, 81 S. C. 235, 62 S. E. 244, 17 L. R. A. (N. S.) 1002; *Foreman v. Western Union Tel. Co.*, 141 Iowa, 32, 116 N. W. 724, 19 L. R. A. (N. S.) 374; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western Union Tel. Co. v. Luck*, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869; *Western Union Tel. Co. v. Butler*, 45 Tex. Civ. App. 28, 99 S. W. 704. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

In some states the right of recovery has been expressly limited to cases where the message dealt with social and personal relations, sickness, and death,<sup>415</sup> and denied in all cases in which messages of a more or less business character were involved, such as messages requesting the addressee to meet the sender at a certain train, and the like,<sup>416</sup> though even in such cases recovery has been allowed when the company had notice of special circumstances which might cause mental suffering.<sup>417</sup>

#### *Kinds of Mental Suffering Compensated*

Mental suffering, to be compensated, must be real, founded on adequate cause, and not a product of a too sensitive mind or a morbid imagination.<sup>418</sup> Mental anguish, moreover, means that degree of mental suffering which amounts to

<sup>415</sup> *Todd v. Western Union Tel. Co.*, 77 S. C. 522, 58 S. E. 433; *Lyles v. Western Union Tel. Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *Toale v. Western Union Tel. Co.*, 76 S. C. 248, 57 S. E. 117; *Bowers v. Western Union Tel. Co.*, 135 N. C. 504, 47 S. E. 597; *Sherrill v. Western Union Tel. Co.*, 116 N. C. 655, 21 S. E. 429. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>416</sup> *Bowers v. Western Union Tel. Co.*, 135 N. C. 504, 47 S. E. 597; *Todd v. Western Union Tel. Co.*, 77 S. C. 522, 58 S. E. 433; *Western Union Tel. Co. v. Howle*, 156 Ala. 331, 47 South. 341; *Western Union Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382; *Western Union Tel. Co. v. Shenep*, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. (N. S.) 886, 119 Am. St. Rep. 145; *Ricketts v. Western Union Tel. Co.*, 10 Tex. Civ. App. 226, 30 S. W. 1105; *De Voegler v. Western Union Tel. Co.*, 10 Tex. Civ. App. 229, 30 S. W. 1107; *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507; *Western Union Tel. Co. v. Archie*, 92 Ark. 59, 121 S. W. 1045; *Western Union Tel. Co. v. Oastler*, 90 Ark. 268, 119 S. W. 285. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>417</sup> *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385; *Toale v. Western Union Tel. Co.*, 76 S. C. 248, 57 S. E. 117. And see *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, 76 Pac. 931, 65 L. R. A. 666, 103 Am. St. Rep. 776. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>418</sup> *Western Union Tel. Co. v. Archie*, 92 Ark. 59, 121 S. W. 1045. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-56; *Cent. Dig.* §§ 100-105; "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

actual distress or severe pain, as distinguished from annoyance, regret, or vexation.<sup>419</sup>

Mental suffering which is merely sentimental cannot be compensated. "For mere inconveniences, such as annoyance, loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental."<sup>420</sup> Compensation may be recovered, in proper cases, for loss of mental capacity;<sup>421</sup> mental suffering, accompanying physical pain;<sup>422</sup> mental

<sup>419</sup> *Johnson v. Western Union Tel. Co.*, 81 S. C. 235, 62 S. E. 244, 17 L. R. A. (N. S.) 1002, 128 Am. St. Rep. 905. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-56; *Cent. Dig.* §§ 100-105; "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>420</sup> *Gerock v. Western Union Tel. Co.*, 147 N. C. 1, 60 S. E. 637; *Hancock v. Western Union Tel. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *Georgia Ry. & Electric Co. v. Baker*, 1 Ga. App. 832, 58 S. E. 88; *Indianapolis St. Ry. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111. See, also, *Walsh v. Chicago, M. & St. P. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *McAllen v. Western Union Tel. Co.*, 70 Tex. 243, 7 S. W. 715. "The plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach." *Hamlin v. Railway Co.*, 1 Hurl. & N. 408, 411. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-56, 102; *Cent. Dig.* §§ 100-105, 255-259; "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>421</sup> *Ballou v. Farnum*, 11 Allen (Mass.) 73; *Wallace v. Western N. C. R. Co.*, 104 N. C. 442, 10 S. E. 552. See "*Damages*," *Dec. Dig. (Key No.)* §§ 48-56, 102; *Cent. Dig.* §§ 100-105, 255-259; "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 69, 70.

<sup>422</sup> *Boyle v. Case* (C. C.) 9 Sawy. 386, 389, 18 Fed. 880; *Carpenter v. Mexican Nat. R. Co.* (C. C.) 39 Fed. 315; *South & N. A. R. Co. v. McLendon*, 63 Ala. 266; *Fairchild v. Stage Co.*, 13 Cal. 599; *Malone v. Hawley*, 46 Cal. 409; *Pierce v. Millay*, 44 Ill. 189; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Sorgenfrei v. Schroeder*, 75 Ill. 397; *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; *Village of Sheridan v. Hibbard*, 119 Ill. 309, 9 N. E. 901; *Muldowney v. Railway Co.*, 36 Iowa, 462; *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Kendall v. City of Albia*, 73 Iowa, 241, 34 N. W. 833; *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; *Smith v. Holcomb*, 99 Mass. 552; *West v. Forrest*, 22 Mo. 344; *Matteson v. New York Cent. R. Co.*, 62 Barb. (N. Y.) 364;

anxiety and distress;<sup>423</sup> fright caused by apprehension of physical harm;<sup>424</sup> loss of peace of mind and happiness;<sup>425</sup> sense of indignity, insult, mortification, or wounded pride;<sup>426</sup>

Wallace v. Western N. C. R. Co., 104 N. C. 442, 10 S. E. 552; Pennsylvania & O. Canal Co. v. Graham, 63 Pa. 290, 3 Am. Rep. 549; Scott Tp. v. Montgomery, 95 Pa. 444; Goodno v. City of Oshkosh, 28 Wis. 300; Stewart v. City of Ripon, 38 Wis. 584. See "Damages," Dec. Dig. (Key No.) §§ 48-56, 102; Cent. Dig. §§ 100-105, 255-259.

<sup>423</sup> See, generally, cases cited in notes supra; also, Godeau v. Blood, 53 Vt. 351, 36 Am. Rep. 751; Western Union Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772. See "Damages," Dec. Dig. (Key No.) §§ 56, 102; Cent. Dig. §§ 104, 105, 255-259; "Telegraphs and Telephones," Dec. Dig. (Key No.) § 68; Cent. Dig. §§ 69, 70.

<sup>424</sup> Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Stutz v. Chicago & N. W. R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769. See, also, Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833, and cases cited in note 345, supra. See "Damages," Dec. Dig. (Key No.) §§ 48-56, 102; Cent. Dig. §§ 100-105, 255-259.

<sup>425</sup> Cox v. Vanderleed, 21 Ind. 164. See "Damages," Dec. Dig. (Key No.) §§ 48-56, 102; Cent. Dig. §§ 100-105, 255-259.

<sup>426</sup> Quigley v. Central Pac. R. Co., 5 Sawy. 107, Fed. Cas. No. 11,510; Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Chicago & A. R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133; Chicago & N. W. Ry. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; Adams v. Smith, 58 Ill. 418; Chicago & N. W. Ry. Co. v. Chisholm, 79 Ill. 584; Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238; Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Shepard v. Chicago R. I. & P. R. Co., 77 Iowa, 54, 41 N. W. 564; Smith v. Pittsburg, Ft. W. & C. R. Co., 23 Ohio St. 10; Stutz v. Chicago & N. W. R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769; Paine v. Chicago R. I. & P. R. Co., 45 Iowa, 569; Fitzgerald v. Chicago R. I. & P. R. Co., 50 Iowa, 79; Batterson v. Chicago & G. T. Ry., 49 Mich. 184, 13 N. W. 508; Chicago & A. R. Co. v. Flagg, 43 Ill. 364, 92 Am. Dec. 133; Carsten v. Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. Rep. 589; Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 664; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; Morgan v. Curley, 142 Mass. 107, 7 N. E. 726; Hastings v. Stetson, 130 Mass. 76; Mahoney v. Belford, 132 Mass. 393; Chesley v. Thompson, 137 Mass. 136; Scripps v. Reilly, 38 Mich. 10; Newman v. Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447; Barnes v. Campbell, 60 N. H. 27. See "Damages," Dec. Dig. (Key No.) § 64; Cent. Dig. § 100.

sense of shame and humiliation;<sup>427</sup> or a blow to the affections.<sup>428</sup>

*Damages for Mental Suffering Compensatory, Not Exemplary*

Damages for mental suffering, when allowed at all, are purely compensatory, not exemplary, vindictive, or punitive. They are designed to indemnify plaintiff for an injury suffered, not to punish defendant for a wrong done. Consequently, the motives of defendant, and the presence or absence of fraud, malice, gross negligence, or oppression, are immaterial.<sup>429</sup> Thus, it was held in an action for libel that plaintiff was entitled to damages for mental suffering, though the jury had acquitted defendants of malice.<sup>430</sup> Exemplary damages are given in some cases where mental suffering is not shown to have resulted from the act complained of; and often, after a full allowance has been made for mental suf-

<sup>427</sup> As in action for seduction, see *Barbour v. Stephenson* (C. C.) 32 Fed. 66; *Hatch v. Fuller*, 131 Mass. 574; *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458; *Lunt v. Philbrick*, 59 N. H. 59; *Riddle v. McGinnis*, 22 W. Va. 253; *Simons v. Busby*, 119 Ind. 13, 21 N. E. 451; *Breon v. Henkle*, 14 Or. 494, 500, 13 Pac. 289; *Giese v. Schultz*, 53 Wis. 462, 10 N. W. 598; *Id.*, 65 Wis. 487, 27 N. W. 353; or for indecent assault, see *Campbell v. Pullman Palace Car Co.* (C. C.) 42 Fed. 484; *Wolf v. Trinkle*, 103 Ind. 355, 3 N. E. 110; *Fay v. Swan*, 44 Mich. 544, 7 N. W. 215; *Ford v. Jones*, 62 Barb. (N. Y.) 484; or for the wrongful execution of a search warrant, *Melcher v. Scruggs*, 72 Mo. 407. See "*Damages*," *Dec. Dig.* (Key No.) § 54; *Cent. Dig.* § 100.

<sup>428</sup> As in actions for breach of promise of marriage, or for grief caused by the failure to deliver a telegram.

<sup>429</sup> *Smith v. Overby*, 30 Ga. 241; *Western Union Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517, 21 S. W. 982; *Dirmeyer v. O'Hern*, 39 La. Ann. 961, 3 South. 132; *American Water-Works Co. v. Dougherty*, 37 Neb. 373, 55 N. W. 1051; *Bixey v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Thomp. Electr.* § 382. Though exemplary damages cannot be recovered against a principal for the act of his agent, damages for mental suffering may. *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504. See "*Damages*," *Dec. Dig.* (Key No.) §§ 48-57; *Cent. Dig.* §§ 100-105.

<sup>430</sup> *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628. And see *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Warner v. Publishing Co.*, 132 N. Y. 181, 30 N. E. 393. See "*Damages*," *Dec. Dig.* (Key No.) §§ 48-57; *Cent. Dig.* §§ 100-105, 255-259.

fering, the circumstances of the case have been held to be such as to justify a further award by way of punishment or example.<sup>431</sup>

*Discretion of Jury*

Damages for mental suffering must be determined from the circumstances of each case. There is no rule for estimating them, but they will be left to the discretion of the jury.<sup>432</sup>

**AGGRAVATION AND MITIGATION OF DAMAGES**

42. Where damages are not capable of exact pecuniary measurement, but must be left to the discretion of a jury, evidence of the circumstances of the wrong addressed to the jury for the purpose of influencing its estimate is said to be in aggravation or mitigation of damages.

The terms "aggravation" and "mitigation" of damages are properly used only where the damages are incapable of exact pecuniary measurement. Indemnity is the aim of the law. Where the exact loss is definitely known, the damages cannot be mitigated to less than full and complete compensation; nor can they be aggravated to more than that amount, unless the circumstances justify the imposition of exemplary damages. Where the amount of damages depends upon the effect of the injury on the feelings, then the circumstances of the injury and the position in life of the parties have a bearing on the amount which should be awarded as compensation. So in the case of an injury to liberty, to family relations and social standing, and where exemplary damages are to be given, such circumstances have a great bearing on the defendant's malice. Where matter in aggravation of damages is

<sup>431</sup> See post, "Exemplary Damages."

<sup>432</sup> St. Joseph & G. I. R. Co. v. Hedge, 44 Neb. 448, 62 N. W. 887; Western Union Tel. Co. v. Simpson, 73 Tex. 422, 11 S. W. 385. See "Damages," Dec. Dig. (Key No.) § 102; Cent. Dig. §§ 255-259.



proper, then matter in mitigation may be shown.<sup>483</sup> But "these terms," says Mr. Sedgwick, in the eighth edition of his work on Damages (volume 1, § 51), "are properly applied only where evidence is presented to the jury for the purpose of affecting its estimate of damages in this class of cases;" and he treats it as a matter of evidence only. In other words, evidence in aggravation or mitigation of damages is admissible only when the jury is called upon to assess exemplary damages, or to estimate damages for nonpecuniary injuries, such as physical and mental suffering. For example, provocation is admissible, in an action for assault,<sup>484</sup> to mitigate exemplary damages or damages for mental suffering. Ordinarily, evidence in aggravation or mitigation of damages is inadmissible in actions of contract. These terms are sometimes loosely used to mean evidence of anything that tends to increase or decrease the damages, but the proper sense is that indicated above.

It is for the jury to say whether the matters given in evidence aggravate or mitigate the damages. It is not a question of law for the court. Therefore, the court should not charge that certain matters must be taken in mitigation of damages, and certain other matters in aggravation.<sup>485</sup> However, as there would ordinarily be no doubt as to the effect of the evidence, such an instruction would probably be harmless error. For example, in an action for slander it would not

<sup>483</sup> *Swank v. Elwert* (Or.) 105 Pac. 901. And see *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384, 27 Am. Dec. 682. See "*Damages*," *Dec. Dig. (Key No.)* §§ 58, 59; *Cent. Dig.* §§ 106-118.

<sup>484</sup> *Smith v. Holcomb*, 99 Mass. 552. See, also, *Currier v. Swan*, 63 Me. 323. And see post, p. 176. Provocation cannot mitigate actual damages for assault and battery. *Goldsmith's Adm'r v. Joy*, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923. See "*Assault and Battery*," *Dec. Dig. (Key No.)* §§ 33, 34; *Cent. Dig.* §§ 45-50; "*Damages*," *Dec. Dig. (Key No.)* §§ 58, 59, 182; *Cent. Dig.* §§ 106-118, 473, 500.

<sup>485</sup> It is for the jury to say whether they will consider seduction as an aggravation of damages in actions for breach of promise of marriage, and it is error to instruct them that they must consider it. *OSMUN v. WINTERS*, 25 Or. 260, 35 Pac. 250, *Cooley, Cas. Damages*, 274. See "*Damages*," *Dec. Dig. (Key No.)* §§ 58, 59, 208; *Cent. Dig.* §§ 106-118, 533.

ordinarily be reversible error to charge that plaintiff's high character and social condition should be considered in aggravation of damages, for the injury to such a one would ordinarily be greater than the one who had no character to lose. Nevertheless, it has been said that, if plaintiff has a well-established character, there is less likelihood of slander hurting him, whereas, if he was a new man starting in the effort to build up a reputation, the same slander might cause more harm. In such a case, therefore, plaintiff's established character may be considered by the jury in mitigation of damages.<sup>436</sup> "The question, in short, is one as to the admissibility and effect of evidence, and not strictly one as to the legal measure of damages. Nevertheless, certain rules as to the effect of some common circumstances (such as provocation, good faith, the position of the parties, etc.) in aggravating or mitigating the damages have been laid down, and are followed in ordinary cases, though, as has been said, they should not be regarded as conclusive. These rules are applied in actions of breach of promise of marriage and of tort for personal injury, and in all actions where exemplary damages are allowed."<sup>437</sup>

<sup>436</sup> *Broughton v. McGrew* (C. C.) 39 Fed. 672, 5 L. R. A. 406. See "*Libel and Slander*," *Dec. Dig.* (Key No.) §§ 110, 111, 116; *Cent. Dig.* §§ 307-324, 343-350.

<sup>437</sup> *Sedg. Dam.* § 52. See, generally, as to aggravation and mitigation of damages, *Grable v. Margrave*, 3 Scam. (Ill.) 372, 38 Am. Dec. 88 (seduction, evidence of defendant's pecuniary ability); *Storey v. Early*, 86 Ill. 461 (libel, defendant's pecuniary ability); *Sayre v. Sayre*, 25 N. J. Law, 235 (slander, evidence of plaintiff's general bad character); *Duval v. Davey*, 32 Ohio St. 604 (slander for charging woman with unchastity, evidence of reputation for chastity); *Mahoney v. Belford*, 132 Mass. 393 (slander, evidence of reputation); *Palmer v. Crook*, 7 Gray (Mass.) 418 (crim. con., previous state of wife's feeling towards husband). In an action by a wife for the alienation of her husband's affections, the rank and condition of defendant cannot be considered, in assessing damages. *Bailey v. Bailey*, 94 Iowa, 598, 63 N. W. 341. In an action by a husband for the loss of his wife's services and society through defendant's negligence, evidence of disturbed marital relations, when restricted to mitigation of damages, is not reversible error. *Sullivan v. Lowell & D. St. Ry. Co.*, 162 Mass. 536, 39 N.

*Assault and Battery*

The current language of the cases is that leave and license<sup>438</sup> and provocation<sup>439</sup> are in mitigation of damages. It would seem, however, more accurate to say that no facts and circumstances can be given in mitigation of actual damages, unless they furnish a legal justification, and are therefore a defense to the cause of action.<sup>440</sup> It is insisted that provocative words cannot be given in mitigation of actual or compensatory damages, but only upon the question of punitive damages.<sup>441</sup> On the other hand, the wealth and social standing of the defendant have in some instances been held to be matters to be considered on the question of aggravation of damages.<sup>442</sup>

E. 185. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* §§ 28, 29; *Cent. Dig.* §§ 40-45; "*Damages*," *Dec. Dig. (Key No.)* §§ 58, 59; *Cent. Dig.* §§ 106-116.

<sup>438</sup> *Fredericksen v. Singer Mfg. Co.*, 38 Minn. 356, 37 N. W. 453. See "*Assault and Battery*," *Dec. Dig. (Key No.)* § 11; *Cent. Dig.* § 9.

<sup>439</sup> *GRONAN v. KUKKUCK*, 59 Iowa, 18, 12 N. W. 748, Cooley, Cas. Damages, 127; *Fraser v. Berkley*, 7 Car. & P. 621; *Avery v. Ray*, 1 Mass. 12; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Burke v. Melvin*, 45 Conn. 243. But not after cooling time. *Thrall v. Knapp*, 17 Iowa, 468; *Lee v. Woolsey*, 19 Johns (N. Y.) 319, 10 Am. Dec. 230; *Goldsmith's Adm'r v. Joy*, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923; *Bonino v. Caledonio*, 144 Mass. 299, 11 N. E. 98; *Prindle v. Haight*, 83 Wis. 50, 52 N. W. 1134. But see *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41. See "*Assault and Battery*," *Dec. Dig. (Key No.)* §§ 12, 30, 33, 34; *Cent. Dig.* §§ 10, 40, 45, 50.

<sup>440</sup> *Birchard v. Booth*, 4 Wis. 67, 76. And see *Corcoran v. Haran*, 55 Wis. 120, 12 N. W. 468; *Robison v. Rupert*, 23 Pa. 523; *Jacobs v. Hoover*, 9 Minn. 204 (Gil. 189); *Watson v. Christie*, 2 Bos. & P. 224; *Dresser v. Blair*, 28 Mich. 501; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Voltz v. Blackmar*, 64 N. Y. 440. See "*Assault and Battery*," *Dec. Dig. (Key No.)* §§ 12, 30-34; *Cent. Dig.* §§ 10, 40-50.

<sup>441</sup> *Goldsmith's Adm'r v. Joy*, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923. And see *Caspar v. Prosdame*, 46 La. Ann. 36, 14 South. 317; *Crosby v. Humphreys*, 59 Minn. 92, 60 N. W. 843. See "*Assault and Battery*," *Dec. Dig. (Key No.)* §§ 12, 30-34; *Cent. Dig.* §§ 10, 40-50.

<sup>442</sup> *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143;

*False Imprisonment*

One who has been wrongfully restrained of liberty of locomotion may recover not only compensatory damages, but wanton disregard of legal right will entitle him to punitive damages, as in an action by a young girl for humiliation, insult, and wounded sensibility consequent upon her arrest.<sup>443</sup> So, too, the fact that the arrest was made in the presence of plaintiff's family has been considered a matter in aggravation.<sup>444</sup> While malice or want of proper cause is no part of the plaintiff's case in an action for false imprisonment, proof that the defendant believed himself to be legally right in making an improper arrest will mitigate exemplary damages, but will not diminish actual damages.<sup>445</sup> But compensatory dam-

Lucas v. Flinn, 35 Iowa, 9. And see Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923. See "Assault and Battery," Dec. Dig. (Key No.) § 33; Cent. Dig. § 46; "Damages," Dec. Dig. (Key No.) §§ 181, 182; Cent. Dig. §§ 473, 474, 499.

<sup>443</sup> Ball v. Horrigan, 65 Hun, 621, 19 N. Y. Supp. 913; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; Pearce v. Needham, 37 Ill. App. 90; Taylor v. Coolidge, 64 Vt. 506, 24 Atl. 656; Hewlett v. George, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682. A verdict for \$2,917 damages has been set aside as excessive for three hours' detention in a lockup. Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127. And a verdict of 6 cents for detention long enough to walk across the street has been sustained as adequate. Henderson v. McReynolds, 60 Hun, 579, 14 N. Y. Supp. 351. And see Cabell v. Arnold (Tex. Civ. App.) 22 S. W. 62; Wiley v. Keokuk, 6 Kan. 94. See "False Imprisonment," Dec. Dig. (Key No.) §§ 29, 30; Cent. Dig. §§ 105-107.

<sup>444</sup> Young v. Gormley, 120 Iowa, 372, 94 N. W. 922. See "False Imprisonment," Dec. Dig. (Key No.) §§ 29, 30, 34; Cent. Dig. §§ 105-107, 111.

<sup>445</sup> Holmes v. Blyler, 80 Iowa, 365, 45 N. W. 756; Oates v. Bullock, 136 Ala. 537, 33 South. 835, 96 Am. St. Rep. 38; Livingston v. Burroughs, 33 Mich. 511; Tenney v. Smith, 63 Vt. 520, 22 Atl. 659; Comer v. Knowles, 17 Kan. 436; Garnier v. Squires, 62 Kan. 321, 62 Pac. 1005; Sleight v. Ogle, 4 E. D. Smith (N. Y.) 445; Miller v. Grice, 2 Rich. (S. C.) 27, 44 Am. Dec. 271; McDaniel v. Needham, 61 Tex. 269; Rogers v. Wilson, Minor (Ala.) 407, 12 Am. Dec. 61; Hill v. Taylor, 50 Mich. 549, 15 N. W. 899; Roth v. Smith, 41 Ill. 314. Good faith as a justification. Aldrich v. Weeks, 63 Vt. 89, 19 Atl. 115. Provocation no justification. Grace v.

ages are not necessarily limited to actual money losses. For an unlawful incarceration in an insane asylum one may recover, not only money expended in procuring his release, but also for consequent humiliation, shame, disgrace, and injury to reputation.<sup>446</sup>

### *Libel and Slander*

On the same principle that whatever tends to prove malice in defamation aggravates the wrong, and entitles the plaintiff to exemplary damages,<sup>447</sup> whatever negatives malice operates to mitigate damages. The jury determines whether given matter is in mitigation or aggravation of damages.

### *Same—Provocation*

Provocation may mitigate damages.<sup>448</sup> The law makes allowance for acts committed in the heat of sudden passion by way of mitigation of damages. But if there had been an opportunity for blood to cool, a mere provocation, connected with wrong complained of, cannot be shown.<sup>449</sup> The defense follows the analogy of provocation as mitigating damages in assault and battery, but there does not seem to be any doc-

Dempsey, 75 Wis. 313, 43 N. W. 1127. Nor bad character of defendant. *Hurlehy v. Martine*, 56 Hun, 648, 10 N. Y. Supp. 92. See "*False Imprisonment*," *Dec. Dig. (Key No.)* §§ 24, 33-35; *Cent. Dig.* §§ 101, 109-112.

<sup>446</sup> *Hewlett v. George*, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682. See "*False Imprisonment*," *Dec. Dig. (Key No.)* §§ 29, 30, 34; *Cent. Dig.* §§ 105-107, 109-112.

<sup>447</sup> See post, p. 310. See, also, *Hayes v. Todd*, 34 Fla. 233, 15 South. 752; *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Grace v. McArthur*, 76 Wis. 641, 45 N. W. 518; *Callahan v. Ingram*, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583. As to aggravation, see *FARRAND v. ALDRICH*, 85 Mich. 593, 48 N. W. 628, *Cooley, Cas. Damages*, 126. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 116-120; *Cent. Dig.* §§ 343-351, 356-364.

<sup>448</sup> *Tarpley v. Blabey*, 2 Bing. N. C. 437. And see *Zurawski v. Reichmann*, 116 Iowa, 388, 90 N. W. 69. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* §§ 164, 318.

<sup>449</sup> *Quinby v. Minnesota Tribune Co.*, 38 Minn. 528, 38 N. W. 623, 8 Am. St. Rep. 693; *Stewart v. Minnesota Tribune Co.*, 41 Minn. 71, 42 N. W. 787. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* §§ 164, 318.

trine akin to contributory negligence, whereby the wrong is barred if the person defamed in some manner induced the publication.<sup>450</sup>

*Same—Common-Law Retraction*

A mere offer to retract cannot be shown in mitigation of damages, but a retraction published in good faith, even after commencement of an action for defamation, may, under some circumstances, be proved in mitigation of damages,<sup>451</sup> but in mitigation only,<sup>452</sup> because it negatives malice.<sup>453</sup> Conversely, evidence that the defamer, subsequent to the publication of the article sued on, has published another, containing a letter from the defamed requesting a retraction, is admissible to show malice.<sup>454</sup>

*Same—Honest Belief—Rumors*

The law recognizes that anything tending to show an honest belief in the substance of the publication when made is admissible for the purpose of disproving malice and mitigating damages, though it tends to prove the truth of the charge.<sup>455</sup> Accordingly, in an action for slander, evidence that the slander

<sup>450</sup> *Vallery v. State*, 42 Neb. 123, 60 N. W. 347. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* §§ 164, 318.

<sup>451</sup> *Turton v. New York Recorder Co.*, 144 N. Y. 144, 38 N. E. 1009; *Davis v. Marxhausen*, 103 Mich. 315, 61 N. W. 504; *Storey v. Wallace*, 60 Ill. 51; *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 66, 104; *Cent. Dig.* §§ 168, 284-291.

<sup>452</sup> *Davis v. Marxhausen*, 103 Mich. 315, 61 N. W. 504. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 66, 104; *Cent. Dig.* §§ 168, 284-291.

<sup>453</sup> *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N. W. 936, 3 L. R. A. 532, 12 Am. St. Rep. 707; *Park v. Detroit Free-Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 66, 104; *Cent. Dig.* §§ 168, 284-291.

<sup>454</sup> *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; *Hotchkiss v. Oliphant*, 2 Hill (N. Y.) 510. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 66, 104; *Cent. Dig.* §§ 168, 284-291.

<sup>455</sup> *Huson v. Dale*, 19 Mich. 17, 26, 2 Am. Rep. 66. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 62, 104; *Cent. Dig.* §§ 162, 163, 317, 284-291.

was only a repetition of a current report of long standing, by which plaintiff's general reputation has become impaired, is admissible in mitigation of damages.<sup>456</sup> And where the article contained several distinct libelous charges, a justification as to part of the charges, and not the whole, goes only in mitigation of damages, and does not warrant a verdict for the defendant.<sup>457</sup> Therefore, partial truth may mitigate damages.<sup>458</sup> But good faith and reasonable belief will not prevent recovery of substantial damages.<sup>459</sup> Cases involving these general principles are constantly arising in connection with the defense urged by the defendant that his conduct was justified by rumors concerning the plaintiff.

So far as it may affect the culpability of the defendant, as mitigating damages, evidence that he knew, believed, and relied on<sup>460</sup> general rumors to the effect of the defamatory matter would be entirely proper. Hence, such evidence is often held to be admissible.<sup>461</sup> However, from the plaintiff's

<sup>456</sup> *Nelson v. Wallace*, 48 Mo. App. 193; *Nailor v. Ponder*, 1 Marv. (Del.) 408, 41 Atl. 88; *Fowler v. Fowler*, 113 Mich. 575, 71 N. W. 1084. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 56, 64; *Cent. Dig.* §§ 153-156, 165.

<sup>457</sup> *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* § 333.

<sup>458</sup> *Sawyer v. Bennett* (Sup.) 20 N. Y. Supp. 45. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* § 333.

<sup>459</sup> *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Blocker v. Schoff*, 83 Iowa, 265, 48 N. W. 1079. See "*Damages*," *Dec. Dig. (Key No.)* § 179; *Cent. Dig.* §§ 476, 477; "*Libel and Slander*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 153-156.

<sup>460</sup> *Larrabee v. Minnesota Tribune Co.*, 36 Minn. 141, 30 N. W. 462; *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528. Truth of the charge, though not pleaded, is admissible to disprove malice, and in mitigation of damages, if it was known at the time of publication, but not otherwise. *Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476; *Quinn v. Scott*, 22 Minn. 456. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 153-156.

<sup>461</sup> *Van Derveer v. Sutphin*, 5 Ohio St. 293; *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 24 Pac. 1051; *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507; *Morrison v. Press Publishing Co.* (Super. N. Y.) 14 N. Y. Supp. 131; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 56, 111; *Cent. Dig.* §§ 153-156, 317.

point of view, the extent of his suffering is not measured by defendant's moral shortcoming or personal righteousness. Hence, such evidence is perhaps as often disallowed.<sup>462</sup> If, however, a defendant offers to prove such rumors, he cannot object to similar evidence in rebuttal.<sup>463</sup> But publishing defamatory matter as a rumor,<sup>464</sup> or giving a specific source as authority,<sup>465</sup> is no longer a defense<sup>466</sup> by way of justification, although it may operate to mitigate damages.<sup>467</sup>

*Some—Plaintiff's Character and Position*

When one claims damages on the ground of the disparagement of his character, evidence in mitigation of damages may be given, under proper allegation,<sup>468</sup> that his character was blemished before the publication of the libel or slander.<sup>469</sup> Thus, in an action for libel, the defendant may prove, in mitigation of damages, that, before and at the time of the

- <sup>462</sup> *Sickva v. Small*, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344; *Scott v. Sampson*, 8 Q. B. Div. 491; *Edwards v. San Jose Printing & Pub. Soc.*, 99 Cal. 431, 34 Pac. 128, 34 Am. St. Rep. 70; *Gray v. Elzroth*, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400; *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. 791. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 56, 111; *Cent. Dig.* §§ 153-156, 317.
- <sup>463</sup> *Bogk v. Gassert*, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. Ed. 631; *Ward v. Blake Mfg. Co.*, 5 C. C. A. 538, 56 Fed. 437. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 56, 111; *Cent. Dig.* §§ 153-156, 317.
- <sup>464</sup> *Haskins v. Lumsden*, 10 Wis. 359; *Republican Pub. Co. v. Miner*, 3 Colo. App. 568, 34 Pac. 485. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 153-156.
- <sup>465</sup> *Maitland v. Goldney*, 2 East, 426; *Northampton's Case*, 12 Coke, 384. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 153-156.
- <sup>466</sup> *Lewis v. Walter*, 4 Barn. & Ald. 605; *Tidman v. Ainslie*, 10 Exch. 63; *Watkin v. Hall*, L. R. 3 Q. B. 396. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 153-156.
- <sup>467</sup> *Dole v. Lyon*, 10 Johns. (N. Y.) 447, 6 Am. Dec. 346. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 64, 111; *Cent. Dig.* §§ 165, 315-317.
- <sup>468</sup> *Halley v. Gregg*, 82 Iowa, 622, 48 N. W. 974; *Ward v. Dean*, 57 Hun, 585, 10 N. Y. Supp. 421. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 61, 110; *Cent. Dig.* §§ 161, 307-316.
- <sup>469</sup> *Davis v. Hamilton*, 88 Minn. 64, 92 N. W. 512. But see *Swift v. Dickerman*, 31 Conn. 285. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 61, 110; *Cent. Dig.* §§ 161, 307-316.



publication of the libel, the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that, on account of this suspicion, his relatives and friends had ceased to associate with him.<sup>470</sup> Evidence of general bad reputation is admissible, in mitigation of damages; and evidence of bad reputation as to that phase of character involved in a case is competent, not to establish any facts in issue, but to explain conduct, and to enable the jury better to weigh the evidence upon doubtful questions of fact bearing on the character of defendant.<sup>471</sup> Therefore, bad reputation for integrity is admissible in charges of political dishonesty. "We should be loth to differentiate a want of integrity in political matters from the same failing in business or society."<sup>472</sup> The plaintiff's general social and personal standing may be shown in evidence as bearing on the question of damages.<sup>473</sup> And if plaintiff alleges her good character and repute, and this is denied by the defendant, the plaintiff is not required to rest upon the legal presumption as to chastity and virtue,<sup>474</sup> but she can properly offer proof under such allegation as part of her case.<sup>475</sup>

<sup>470</sup> *Earl of Leicester v. Walter*, 2 Camp. 251. Cf. *Sanford v. Rowley*, 93 Mich. 119, 52 N. W. 1119. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 61, 110; *Cent. Dig.* §§ 161, 307-316.

<sup>471</sup> *Hallam v. Post Pub. Co. (C. C.)* 55 Fed. 456; *Sickra v. Small*, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344; *Candrian v. Miller*, 98 Wis. 164, 73 N. W. 1004. See *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 61, 110; *Cent. Dig.* §§ 161, 307-316.

<sup>472</sup> *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 530.

<sup>473</sup> *Larned v. Buffinton*, 3 Mass. 546, 3 Am. Dec. 185; *Klumph v. Dunn*, 66 Pa. 141, 5 Am. Rep. 355; *Press Pub. Co. v. McDonald*, 11 C. C. A. 155, 63 Fed. 238, 26 L. R. A. 53; *Morey v. Morning Journal Ass'n*, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730; *FARRAND v. ALDRICH*, 85 Mich. 593, 48 N. W. 628, *Cooley, Cas. Damages*, 126; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 61, 107; *Cent. Dig.* §§ 161, 302, 316.

<sup>474</sup> *Conroy v. Pittsburgh Times*, 139 Pa. 334, 21 Atl. 154, 11 L. R. A. 725, 23 Am. St. Rep. 188. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 61, 100, 110; *Cent. Dig.* §§ 161, 256, 302, 316.

<sup>475</sup> *Stafford v. Morning Journal Ass'n*, 142 N. Y. 598, 37 N. E. 625; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 100; *Cent. Dig.* § 256.

## REDUCTION OF LOSS

43. An injured party cannot be compelled to accept specific reparation in lieu of damages; but, if he does so voluntarily, it will operate as a reduction of damages.
44. Reparation received from a third person will not reduce the loss, if it is in the nature of a pure gratuity, or is paid in pursuance of a contract the consideration of which moved from the injured person.
45. Benefits received by the injured person, incident to the injury, may be shown in reduction of the loss.

The right to recover damages is a species of property which vests absolutely in the injured party on the happening of the wrong.<sup>476</sup> It is a right to recover a money judgment, and nothing but the injured party's own act can release it.<sup>477</sup> He cannot be compelled to accept specific reparation in lieu of damages, for he has an absolute right to a money judgment.<sup>478</sup>

<sup>476</sup> See ante, p. 2. Where plaintiff cured certain fruit for defendants, who disposed of it at values usually obtained for good fruit, that fact will not affect plaintiff's liability to defendants for damages to the fruit in defectively curing it. *E. E. Thomas Fruit Co. v. Start*, 107 Cal. 206, 40 Pac. 336. See "*Damages*," *Dec. Dig. (Key No.)* § 7; *Cent. Dig.* § 6.

<sup>477</sup> Ordinarily the fact that the wrongdoer applied the proceeds of his wrong for plaintiff's benefit will not reduce the damages, as plaintiff may refuse to accept such application. *Torry v. Black*, 58 N. Y. 185; *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511; *Edmondson v. Nuttall*, 17 C. B. (N. S.) 279; *Northrup v. McGill*, 27 Mich. 234. See "*Damages*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 115, 116.

<sup>478</sup> In *Fisher v. Prince*, 3 Burrows, 1363, Lord Mansfield said: "Where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended by any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages, there the specific thing demanded may be brought into court. Where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it

Hence an offer by defendant to return converted property will not reduce the damages if not accepted by the plaintiff.<sup>479</sup> The rule of avoidable consequences does not require the injured party to receive back converted property, nor to buy it back, though offered at less than the market price.<sup>480</sup> The rule has no application to losses already completely suffered. As to such losses, the right to pecuniary compensation is absolute. But if the reparation offered would prevent further loss, not at that time actually suffered, the rule applies, and the reparation must be accepted, as compensation for subsequent losses will be denied.

*Reparation Preventing Actual Loss*

Where the reparation by defendant has actually prevented the happening of any damage in the first instance, from the injury, it may be shown, whether accepted by the plaintiff or not, as it goes to show the actual amount of damage, and plaintiff never had a right to recover anything more.<sup>481</sup> Thus,

that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, then it shall not be brought in." See, also, *Whitten v. Fuller*, 2 W. Bl. 902; *Earle v. Holderness*, 4 Bing. 462; *Tucker v. Wright*, 3 Bing. 601; *Gibson v. Humphrey*, 1 Crompt. & M. 544. The practice of staying proceedings upon bringing property into court has never generally prevailed in this country, but it seems to be the practice in Vermont. *Rutland & W. R. Co. v. Bank of Middlebury*, 32 Vt. 639; *Bucklin v. Beals*, 38 Vt. 653. And see *Stevens v. Low*, 2 Hill (N. Y.) 132; *Shotwell v. Wendover*, 1 Johns. (N. Y.) 65. See "Damages," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* §§ 133, 134.

<sup>479</sup> *Norman v. Rogers*, 29 Ark. 365; *Carpenter v. American Bldg. & Loan Ass'n*, 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345; *Carpenter v. Dresser*, 72 Me. 377, 30 Am. Rep. 337; *Stickney v. Allen*, 10 Gray (Mass.) 352; *Bringard v. Stellwagen*, 41 Mich. 54, 1 N. W. 909; *Livermore v. Northrup*, 44 N. Y. 107; *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun, 47; *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec. 519; *Morgan v. Kidder*, 55 Vt. 367. See "Damages," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* §§ 12, 133, 134.

<sup>480</sup> *Weld v. Reilly*, 48 N. Y. Super. Ct. 531; *Munson v. Munson*, 24 Conn. 115; *Woods v. McCall*, 67 Ga. 506. See "Damages," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* §§ 12, 133, 134.

<sup>481</sup> *Dow v. Humbert*, 91 U. S. 294, 23 L. Ed. 368; *Monnville v. City of Worcester*, 138 Mass. 89, 52 Am. Rep. 261. See "Damages," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* §§ 133, 134.

in an action for breach of a covenant against incumbrances, where the covenantor bought in the outstanding incumbrance, and the plaintiff was not actually injured by it, it was held that only nominal damages could be recovered.<sup>482</sup>

*Reparation Accepted.*

Where the reparation offered is voluntarily accepted, there is a reduction of the loss,<sup>483</sup> and the damages recoverable are the difference between the original loss and the value of the thing returned at the time of acceptance, for that represents the actual loss. One cannot have both the thing itself and damages for its loss. This has been held in actions of trover,<sup>484</sup> trespass,<sup>485</sup> and replevin,<sup>486</sup> where the property wrongfully taken was returned to and accepted by the plaintiff. But even in such cases nominal damages may

<sup>482</sup> *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405; *Hartford & S. Ore Co. v. Miller*, 41 Conn. 112. See "*Damages*," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* §§ 132, 134.

<sup>483</sup> *New York Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 78 N. E. 463, holding that a partial satisfaction is a reduction pro tanto. See "*Damages*," *Dec. Dig. (Key No.)* § 63; *Cent. Dig.* §§ 132, 134.

<sup>484</sup> *Barrelett v. Bellgard*, 71 Ill. 280; *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; *McCormick v. Pennsylvania Cent. R. Co.*, 80 N. Y. 535; *Dailey v. Crowley*, 5 Lans. (N. Y.) 301; *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *Delano v. Curtis*, 7 Allen (Mass.) 470; *Perham v. Coney*, 117 Mass. 102; *Gove v. Watson*, 61 N. H. 136; *Murphy v. Hobbs*, 8 Colo. 17, 5 Pac. 637; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *Reafro's Adm'x v. Hughes*, 69 Ala. 581; *Yale v. Saunders*, 16 Vt. 243. See "*Damages*," *Dec. Dig. (Key No.)* §§ 9, 63; *Cent. Dig.* §§ 12, 133, 134; "*Trover and Conversion*," *Dec. Dig. (Key No.)* § 58; *Cent. Dig.* § 277.

<sup>485</sup> *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91; *Vosburgh v. Welch*, 11 Johns. (N. Y.) 175; *Gibbs v. Chase*, 10 Mass. 125. See *Mayo v. City of Springfield*, 138 Mass. 70. See "*Damages*," *Dec. Dig. (Key No.)* §§ 9, 63; *Cent. Dig.* §§ 12, 133, 134; "*Trespass*," *Dec. Dig. (Key No.)* § 55; *Cent. Dig.* § 143.

<sup>486</sup> *De Witt v. Morris*, 13 Wend. (N. Y.) 496; *Conroy v. Flint*, 5 Cal. 327. See "*Damages*," *Dec. Dig. (Key No.)* §§ 9, 63; *Cent. Dig.* §§ 12, 133, 134; "*Replevin*," *Dec. Dig. (Key No.)* § 76; *Cent. Dig.* §§ 305, 306.

be recovered.<sup>487</sup> So, also, where property taken has been recovered by the owner, by repurchase or otherwise, the damages for the taking will be reduced by the value of the property recovered; but compensation will be given for the expenses incurred in recovering the property.<sup>488</sup>

#### *Reparation by Third Party*

Reparation made by a third party, if accepted as such, or if of a nature to prevent further loss, will reduce the damages recoverable;<sup>489</sup> but if a benefit received from a third person be a pure gratuity, and not intended to be in lieu of damages, or if it be paid, not by procurement of defendant, but in pursuance to a contract founded on a consideration paid by plaintiff, it will not reduce the damages, though made on account of the injury.<sup>490</sup> Thus, in an action for personal injuries, the fact that a third person, in whose employment plaintiff was, continued his salary during the time he was

<sup>487</sup> *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Wheelock v. Wheelwright*, 5 Mass. 104; *Gibbs v. Chase*, 10 Mass. 125. See "Damages," *Dec. Dig. (Key No.)* §§ 9, 63; *Cent. Dig.* §§ 12, 133, 134.

<sup>488</sup> *McInroy v. Dyer*, 47 Pa. 118; *Felton v. Fuller*, 35 N. H. 226; *Dodson v. Cooper*, 37 Kan. 346, 15 Pac. 200; *Forsyth v. Palmer*, 14 Pa. 96, 53 Am. Dec. 519; *Ford v. Williams*, 24 N. Y. 359; *Baldwin v. Porter*, 12 Conn. 473; *Johannesson v. Borschenius*, 35 Wis. 131; *Sprague v. Brown*, 40 Wis. 612; *Tambaco v. Simpson*, 19 C. B. (N. S.) 453. But see *Harris v. Eldred*, 42 Vt. 39. See "Damages," *Dec. Dig. (Key No.)* §§ 63, 116; *Cent. Dig.* §§ 133, 134.

<sup>489</sup> As where satisfaction is accepted from a joint tort-feasor. *Knapp v. Roche*, 94 N. Y. 329; *Heyer v. Carr*, 6 R. I. 45; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Chamberlin v. Murphy*, 41 Vt. 110. Where land on which houses are being built is taken for a city street, the contractor cannot recover damages from both the city and the owner for the same items of loss. *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263; *Lanahan v. Heaver*, 79 Md. 413, 29 Atl. 1036. See "Damages," *Dec. Dig. (Key No.)* § 59; *Cent. Dig.* §§ 110-112.

<sup>490</sup> *Citizens' Gas & Oil Min. Co. v. Whipple*, 32 Ind. App. 203, 69 N. E. 557; *Morris v. Grand Ave. Ry. Co.*, 144 Mo. 500, 46 S. W. 170; *Norristown v. Moyer*, 67 Pa. 355. See "Damages," *Dec. Dig. (Key No.)* § 59; *Cent. Dig.* §§ 110-112; "Judgment," *Dec. Dig. (Key No.)* §§ 630, 631; *Cent. Dig.* §§ 1064, 1088, 1146, 1147; "Payment," *Dec. Dig. (Key No.)* §§ 51, 52; *Cent. Dig.* §§ 135, 136.

disabled, will not reduce the damages recoverable from defendant.<sup>491</sup> The defendant is liable for the value of care and nursing, though it was furnished gratuitously.<sup>492</sup> So, also, the payment of insurance money will not operate to reduce damages.<sup>493</sup>

### *Benefits Incident to Injury*

If the wrongful act results in both a benefit and an injury, allowance in reduction of the loss must be made for the benefit.<sup>494</sup> Thus, where one wrongfully dug a drain on an-

<sup>491</sup> *Ohio & M. R. N. Co. v. Dickerson*, 59 Ind. 317; *NASHVILLE C. & ST. L. RY. CO. v. MILLER*, 120 Ga. 453, 47 S. E. 959, 67 L. R. A. 87, *Cooley*, Cas. Damages, 128; *Illinois Cent. R. Co. v. Porter*, 117 Tenn. 13, 94 S. W. 666. See, also, *Elmer v. Fessenden*, 154 Mass. 427, 28 N. E. 399. See "*Damages*," *Dec. Dig. (Key No.)* § 59; *Cent. Dig.* §§ 110-112.

<sup>492</sup> *Varnham v. City of Council Bluffs*, 52 Iowa, 698, 3 N. W. 792; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874. But see *Peppercorn v. City of Black River Falls*, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818. See "*Damages*," *Dec. Dig. (Key No.)* § 59; *Cent. Dig.* §§ 110-112.

<sup>493</sup> *Allen v. Barrett*, 100 Iowa, 16, 69 N. W. 272; *Matthews v. Missouri Pac. Ry. Co.*, 142 Mo. 645, 44 S. W. 802; *Baltimore City Pass. Ry. Co. v. Baer*, 90 Md. 97, 44 Atl. 992; *Ralfe v. Boston & M. R. R.*, 69 N. H. 476, 45 Atl. 251; *Kingsbury v. Westfall*, 61 N. Y. 356; *Althorf v. Wolfe*, 22 N. Y. 355; *Briggs v. New York Cent. & H. R. Co.*, 72 N. Y. 26; *Carpenter v. Eastern Transp. Co.*, 71 N. Y. 574; *Pittsburg, C. & St. L. Ry. Co. v. Thompson*, 56 Ill. 138; *Dillon v. Hunt*, 105 Mo. 154, 16 S. W. 516, 24 Am. St. Rep. 374; *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753; *Hayward v. Cain*, 105 Mass. 213; *Weber v. Morris & E. R. Co.*, 36 N. J. Law, 213; *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304; *Perrott v. Shearer*, 17 Mich. 48; *Texas & P. R. Co. v. Levi*, 59 Tex. 674; *The Monticello v. Mollison*, 17 How. 153, 15 L. Ed. 68; *Yates v. Whyte*, 4 Bing. N. C. 272. See, also, *Congdon v. Scale Co.*, 66 Vt. 255, 29 Atl. 253; *Eureka Fertilizer Co. of Cecil County v. Baltimore Copper, Smelting & Rolling Co.*, 78 Md. 179, 27 Atl. 1035; *Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. Rep. 465. See "*Damages*," *Dec. Dig. (Key No.)* § 59; *Cent. Dig.* §§ 110-112.

<sup>494</sup> *Mayo v. City of Springfield*, 138 Mass. 70; *MURPHY v. CITY OF FOND DU LAC*, 23 Wis. 365, 99 Am. Dec. 181, *Cooley*, Cas. Damages, 123; *Whitely v. Mississippi Water Power & Boom Co.*, 38 Minn. 523, 38 N. W. 753; *Hicks v. Drew*, 117 Cal. 305, 49 Pac.

other's land, it may be shown in reduction of the damages that the drain was a benefit to the land.<sup>495</sup> So, too, where lands have been flooded, benefits resulting therefrom may be taken into consideration in reduction of the damage.<sup>496</sup>

One of the most common instances of benefits received by the injured person is where the proceeds of property wrongfully taken are applied for the benefit of the owner. In such cases, whether the benefits derived by the owner will go to reduce the loss depends on the circumstances and manner of the application of the proceeds. Generally, if the wrongdoer himself makes the application of the proceeds to the payment of debts owing by the plaintiff, he cannot plead that fact in reduction of the damages.<sup>497</sup> If, however, the application of the proceeds is authorized by law, the injured party cannot object, and the damages will be reduced.<sup>498</sup> So, in conversion, the defendant may show in reduction of the loss that the goods were seized and sold under process against plaintiff issued at the instance of a third person.<sup>499</sup>

189; *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 51 South. 775. See "*Damages*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 115, 116.

<sup>495</sup> *Burtraw v. Clark*, 103 Mich. 383, 61 N. W. 552. See "*Damages*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 115, 116.

<sup>496</sup> *Imboden v. Etowah & B. B., Hydraulic Hose Min. Co.*, 70 Ga. 86; *Howe v. Ray*, 113 Mass. 88; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171. And see *Marcy v. Fries*, 18 Kan. 353. But the contrary is held in *Gerrish v. New Market Mfg. Co.*, 30 N. H. 478. See "*Damages*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 115, 116.

<sup>497</sup> *Northrup v. McGill*, 27 Mich. 234; *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511; *Torry v. Black*, 58 N. Y. 185. A sheriff who has wrongfully sold goods belonging to plaintiff cannot reduce the damages by showing that he paid a debt of the plaintiff out of the proceeds. *Parham v. McMurray*, 32 Ark. 261; *Dallam v. Fitler*, 6 Watts & S. (Pa.) 323; *McMichael v. Mason*, 13 Pa. 214. See "*Damages*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 115, 116.

<sup>498</sup> *Kaley v. Shed*, 10 Metc. (Mass.) 317; *Empire Mill Co. v. Lovell*, 77 Iowa, 100, 41 N. W. 583, 14 Am. St. Rep. 272; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396. See "*Damages*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 115, 116.

<sup>499</sup> *Lazarus v. Ely*, 45 Conn. 504; *Bates v. Courtwright*, 36 Ill. 516; *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511; *Howard v. Man-*

### INJURIES TO LIMITED INTERESTS

46. The measure of damages for injuries to limited interests in property will be considered under the following heads:

- (a) Interests in real property in possession and in expectancy.
- (b) Special property and ultimate ownership in personal property.
- (c) Interest of mortgagors and mortgagees.
- (d) Joint interests.

#### *Interests in Real Property in Possession and in Expectancy*

One having the right to the possession of real property for a limited time can recover for any interference with his possession or injury to the property only the damages to his own interests, and not for the whole injury. This rule applies to life tenants,<sup>500</sup> lessees,<sup>501</sup> and to mere occupants.<sup>502</sup> But a lessee may recover compensation for the whole injury when he is liable over to his landlord.<sup>503</sup> The owners of ex-

derfield, 31 Minn. 337, 17 N. W. 946. But see *Hopple v. Higbee*, 23 N. J. Law, 342. See "Damages," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 115, 116; "Trover and Conversion," *Dec. Dig. (Key No.)* § 59; *Cent. Dig.* §§ 278-280.

<sup>500</sup> *Greer v. Mayor, etc.*, of New York, 1 Abb. Prac. N. S. (N. Y.) 206. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284.

<sup>501</sup> *ELLIOTT v. MISSOURI PAC. RY. CO.*, 8 Kan. App. 191, 55 Pac. 490, Cooley, Cas. Damages, 133; *Ely v. Edison Electric Illuminating Co.*, 111 App. Div. 170, 97 N. Y. Supp. 592, affirmed in 188 N. Y. 582, 81 N. E. 1160; *Holmes v. Davis*, 19 N. Y. 488; Cf. *Terry v. Mayor, etc.*, of New York, 8 Bosw. (N. Y.) 504; *Illinois & St. L. Railroad & Coal Co. v. Cobb*, 94 Ill. 55. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284.

<sup>502</sup> *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Sweeney v. Connaughton*, 100 Ill. App. 79. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284.

<sup>503</sup> *Walter v. Post*, 4 Abb. Prac. 382. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284; "Landlord and Tenant," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* § 515.



pectant interests in land, lessors, reversioners, and remaindermen can recover for injuries to the property only the damages to their own interests.<sup>504</sup>

*Special Property and Ultimate Ownership in Personal Property*

One having a special property in personal property, such as a lessee,<sup>505</sup> pledgee,<sup>506</sup> factor,<sup>507</sup> or bailee,<sup>508</sup> is treated as the owner in actions against third persons for the loss or injury of the property, and recovers the damages to his own interest and that of the ultimate owner. The same rule obtains in a suit on a replevin bond in nearly all the states,<sup>509</sup>

<sup>504</sup> *Cooper v. Randall*, 59 Ill. 317; *Schnable v. Koehler*, 28 Pa. 181; *Seeley v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *Dorsey v. Moore*, 100 N. C. 41, 6 S. E. 270; *Clark v. New York, N. H. & H. R. Co.*, 26 R. I. 59, 58 Atl. 245; *Dutro v. Wilson*, 4 Ohio St. 101. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284.

<sup>505</sup> *Caswell v. Howard*, 16 Pick. (Mass.) 562; *St. Louis, I. M. & S. Ry. Co. v. Biggs*, 50 Ark. 169, 6 S. W. 724. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284; "Pledges," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 95, 96.

<sup>506</sup> *United States Exp. Co. v. Meints*, 72 Ill. 293; *Mechanics' & Traders' Bank of Buffalo v. Farmers' and Mechanics' Nat. Bank of Buffalo*, 60 N. Y. 40; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137; *Pomeroy v. Smith*, 17 Pick. (Mass.) 85; *Lyle v. Barker*, 5 Bin. (Pa.) 457. A depositary may maintain any proper action to protect himself and the depositor. *Knight v. Davis Carriage Co.*, 18 C. C. A. 287, 71 Fed. 662. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284; "Pledges," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 95, 96.

<sup>507</sup> *Groover v. Warfield*, 50 Ga. 644. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284; "Factors," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* § 82.

<sup>508</sup> *Brewster v. Warner*, 136 Mass. 57, 49 Am. Rep. 5; *Finn v. Western R. Corp.*, 112 Mass. 524, 17 Am. Rep. 128; *Garretson v. Brown*, 26 N. J. Law, 425; *WAGGONER v. SNODY*, 98 Tex. 512, 85 S. W. 1134; *Cooley, Cas. Damages*, 136; *Rooth v. Wilson*, 1 Barn. & Ald. 59; *Armory v. Delamirie*, 1 Strange, 505. But see *Claridge v. Tramway Co.* [1892] 1 Q. B. 422. See "Bailment," *Dec. Dig. (Key No.)* § 21; *Cent. Dig.* §§ 91-102; "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284.

<sup>509</sup> *Atkins v. Moore*, 82 Ill. 240; *Broadwell v. Paradise*, 81 Ill. 474; *Buck v. Remsen*, 34 N. Y. 383; *Burt v. Burt*, 41 Mich. 82, 1 N.

though there are a few decisions contra.<sup>510</sup> If the owner, for any reason, could not recover against the wrongdoer, then the one in possession under a special property can recover only for the injury to his special property.<sup>511</sup> The measure of damages is the same in an action against the owner for conversion or injury to the property.<sup>512</sup> For conversion or injury to property, the owner can recover of one in possession the value of the property, less the defendant's interest therein.<sup>513</sup> Against a third person the owner recovers the full value of the property, or compensation for the injury to it.<sup>514</sup>

### *Interest of Mortgagors and Mortgagees*

A mortgagee of real property can recover for any injury to the mortgaged property, either by the mortgagor or by a

W. 936; *Frei v. Vogel*, 40 Mo. 149; *Frey v. Drahos*, 7 Neb. 194. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284; "Replevin," *Dec. Dig. (Key No.)* § 124; *Cent. Dig.* §§ 487-497.

<sup>510</sup> *Hayden v. Anderson*, 17 Iowa, 158; *Jennings v. Johnson*, 17 Ohio, 154, 49 Am. Dec. 451; *Latimer v. Motter*, 26 Ohio St. 480; *Cumberland Coal & Iron Co. v. Tilghman*, 13 Md. 74. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284; "Replevin," *Dec. Dig. (Key No.)* § 124; *Cent. Dig.* §§ 487-497.

<sup>511</sup> *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *City of Lowell v. Parker*, 10 Metc. (Mass.) 309, 43 Am. Dec. 436; *Mears v. Cornwall*, 73 Mich. 78, 40 N. W. 931; *Sheldon v. Express Co.*, 48 Ga. 625. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284; "Trover and Conversion," *Dec. Dig. (Key No.)* § 42; *Cent. Dig.* § 248.

<sup>512</sup> *Davidson v. Gunsolly*, 1 Mich. 388; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Baldwin v. Bradley*, 69 Ill. 32. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284.

<sup>513</sup> *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235; *Fowler v. Gilman*, 13 Metc. (Mass.) 267; *Craig v. McHenry*, 35 Pa. 120; *Wheeler v. Pereles*, 43 Wis. 332; *Chinery v. Viall*, 5 Mees. & W. 288; *Johnson v. Stear*, 15 C. B. (N. S.) 330. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284; "Trover and Conversion," *(Key No.)* §§ 42, 44; *Cent. Dig.* §§ 248, 260, 261.

<sup>514</sup> *Green v. Clark*, 12 N. Y. 343. See "Damages," *Dec. Dig. (Key No.)* § 114; *Cent. Dig.* § 284; "Trover and Conversion," *Dec. Dig.* § 42; *Cent. Dig.* § 248.

third person, the amount in which his security is impaired.<sup>515</sup> A mortgagee of personal property can recover against a stranger full compensation for any injury to the property.<sup>516</sup> But, against the mortgagor, he can recover only the amount due on the mortgage debt, provided this does not exceed the value of the property.<sup>517</sup> A mortgagor of personal property, in an action against the mortgagee, can recover the value of the property less the amount due the mortgagee.<sup>518</sup> Against a stranger, he recovers the value of the property.<sup>519</sup>

### *Joint Interest*

A joint owner can recover against a co-owner, for injuries to the joint property, or for excluding him from its posses-

<sup>515</sup> Van Pelt v. McGraw, 4 N. Y. 110; Gardner v. Heartt, 3 Denio (N. Y.) 232; Atkinson v. Hewett, 63 Wis. 396, 23 N. W. 889; State v. Weston, 17 Wis. 107; ELVINS v. DELAWARE & A. TELEGRAPH & TEL. CO., 63 N. J. Law, 243, 43 Atl. 903, 76 Am. St. Rep. 217, Cooley, Cas. Damages, 134; Schalk v. Kingsley, 43 N. J. Law, 32. For a modification of this rule in Massachusetts, see Gooding v. Shea, 103 Mass. 360, 4 Am. Rep. 563; Byrom v. Chapin, 113 Mass. 308. As to recovery by a junior mortgagee, see Turrell v. Jackson, 39 N. J. Law, 329. See "Mortgages," Dec. Dig. (Key No.) §§ 207, 217; Cent. Dig. §§ 553, 559, 560.

<sup>516</sup> Lowe v. Wing, 56 Wis. 31, 13 N. W. 892; Allen v. Butman, 138 Mass. 586; Densmore v. Mathews, 58 Mich. 616, 26 N. W. 146; Adamson v. Peterson, 35 Minn. 529, 29 N. W. 321; White v. Webb, 15 Conn. 302. See "Chattel Mortgages," Dec. Dig. (Key No.) § 177; Cent. Dig. §§ 353-355.

<sup>517</sup> Smith v. Phillips, 47 Wis. 202, 2 N. W. 285; Parish v. Wheeler, 23 N. Y. 494; McFadden v. Hopkins, 81 Ind. 459. But the recovery cannot exceed the value of the property. Ganong v. Green, 71 Mich. 1, 38 N. W. 661. See "Chattel Mortgages," Dec. Dig. (Key No.) § 176; Cent. Dig. § 339.

<sup>518</sup> Dahill v. Booker, 140 Mass. 308, 5 N. E. 496, 54 Am. Rep. 465; Russell v. Butterfield, 21 Wend. (N. Y.) 300; Bearss v. Preston, 66 Mich. 11, 32 N. W. 912; Torp v. Gulseth, 37 Minn. 135, 33 N. W. 550; Deal v. D. M. Osborne & Co., 42 Minn. 102, 43 N. W. 835. See "Chattel Mortgages," Dec. Dig. (Key No.) § 176; Cent. Dig. §§ 330-339.

<sup>519</sup> Cram v. Bailey, 10 Gray (Mass.) 87; Gallatin & N. Turnpike Co. v. Fry, 88 Tenn. 296, 12 S. W. 720; Brown v. Carroll, 16 R. I. 604, 18 Atl. 283. See "Chattel Mortgages," Dec. Dig. (Key No.) § 177; Cent. Dig. §§ 353-355.

sion, only a compensation proportioned to his interest.<sup>520</sup> Against third persons, a joint owner can recover only his share. The rule is the same for both real<sup>521</sup> and personal property.<sup>522</sup>

<sup>520</sup> Green v. Edick, 66 Barb. (N. Y.) 564; Cutter v. Waddingham, 33 Mo. 269; Cf. Daniels v. Brown, 34 N. H. 454, 69 Am. Dec. 505. See "Damages," Dec. Dig. (Key No.) § 114; Cent. Dig. § 284; "Tenancy in Common," Dec. Dig. (Key No.) §§ 27, 28; Cent. Dig. §§ 70-88.

<sup>521</sup> Putney v. Lapham, 10 Cush. (Mass.) 232; Clark v. Huber, 20 Cal. 196; Holdfast v. Shephard, 9 Ired. 222; McGrew v. Harmon, 164 Pa. 115, 30 Atl. 285, 288. See "Tenancy in Common," Dec. Dig. (Key No.) § 55; Cent. Dig. § 154.

<sup>522</sup> WAGGONER v. SNODY, 98 Tex. 512, 85 S. W. 1134, Cooley, Cas. Damages, 136; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Bartlett v. Kidder, 14 Gray (Mass.) 449; Thompson v. Hoskins, 11 Mass. 419; Hillhouse v. Mix, 1 Root (Conn.) 246, 1 Am. Dec. 41. See "Tenancy in Common," Dec. Dig. (Key No.) § 55; Cent. Dig. § 154.

## CHAPTER IV

### BONDS, LIQUIDATED DAMAGES, AND ALTERNATIVE CONTRACTS

- 47. Penal Bonds.
- 48-50. Liquidated Damages and Penalties.
- 51-60. Rules of Construction.
- 61. Alternative Contracts.

#### PENAL BONDS

- 47. In an action on a penal bond the measure of damages is compensation for the actual loss, not exceeding the penalty named.**

Questions involving a consideration of liquidated damages and penalties formerly arose chiefly in connection with that peculiar form of obligation known as a "common-law bond." By a common-law bond the obligor bound himself to pay a certain sum of money, and at a certain time, to the obligee, upon condition, however, that the obligation should be void on the payment of a less sum, or the performance of some particular act. There was, however, no agreement to pay the smaller sum, or perform the designated act. Upon breach of condition, therefore, the sum named in the bond, became the debt, and could be recovered in an action of debt on the bond. This sum is called a "penalty;" and the bond, a "penal bond." Blackstone says:<sup>1</sup> "The penalty named in the bond was originally inserted for the purpose of evading the absurdity of those monkish constitutions which prohibited the taking of interest for money, and was therefore pardonably considered the real debt, in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid." The rule continued to be enforced however,

<sup>1</sup> 3 Bl. Comm. 434.

by courts of law, even after the recovery of interests was allowed by statute. Chancery early assumed jurisdiction to relieve against the penalty when the obligor was prevented by accident from fulfilling his obligation on the day fixed. This it did by enjoining the execution of the judgment for the penalty, on condition that the obligor would do equity by paying the real debt, with interest for its detention, and costs. Subsequently equity extended its jurisdiction, and relieved against the penalty in all cases of default, from whatever cause, in other kinds of penal bonds, on the payment of just compensation.<sup>2</sup> This was on the broad principle that compensation, not forfeiture, is equity. This practice was ultimately followed by courts of law, and was finally sanctioned by statute. Such statutes are in force generally in the United States. But it would seem that courts of law have power to grant such relief on general principles, without reference to statutes.<sup>3</sup>

Although the damages in an action on a penal bond may be less than the penalty named, as just explained, they can never be greater.<sup>4</sup> This was because such bond contained no agreement to pay the smaller sum or perform the stipulated act. The only promise or undertaking was to pay the penal sum in default of performance of the condition. Hence at common law no action could be maintained except for the penal sum, and of course the damages could never exceed that sum.

<sup>2</sup>Roy v. Duke of Beaufort, 2 Atk. 190. See "Damages," Dec. Dig. (Key No.) §§ 74, 76; Cent. Dig. §§ 154, 155; "Equity," Dec. Dig. (Key No.) § 24; Cent. Dig. §§ 69-76.

<sup>3</sup>Betts v. Burch, 4 Hurl. & N. 506. See 2 White & T. Lead. Cas. Eq. 4th Eng. Ed.) 1098. See "Courts," Dec. Dig. (Key No.) § 472; Cent. Dig. § 1218; "Equity," Dec. Dig. (Key No.) § 44; Cent. Dig. §§ 141-145.

<sup>4</sup>White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313; Fraser v. Little, 13 Mich. 195, 87 Am. Dec. 741. But see Wyman v. Robinson, 73 Me. 384, 40 Am. Rep. 360. See "Damages," Dec. Dig. (Key No.) § 85; Cent. Dig. § 179.

**LIQUIDATED DAMAGES AND PENALTIES**

48. Liquidated damages are damages agreed upon by the parties as compensation for, and in lieu of, the actual damages arising from a breach of contract.
49. A penalty is a sum agreed to be paid or forfeited absolutely upon nonperformance of the contract, regardless of the actual damages suffered, and is intended rather to secure performance, than as compensation for a breach.
50. Where the parties to a contract agree upon liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages; but, where the sum fixed is a penalty, the actual damages suffered, whether more or less, may be recovered.

*Intent of Parties*

In making contracts, the parties are at liberty to stipulate that a specified sum shall be paid by one party to the other as compensation for the breach. That sum is designated as "liquidated damages." Liquidated damages, then, are damages agreed upon by the parties as compensation for and in lieu of the actual damages arising from a breach of contract.<sup>5</sup> On the happening of a breach, the stipulated sum is the precise sum to be recovered, be the actual damages more or less.<sup>6</sup> Equity will not relieve against it. To have this effect, it is, of course, primarily essential that the parties so intended. If

<sup>5</sup> *Dwinel v. Brown*, 54 Me. 468, 474, per Appellton, C. J., dissenting. See "Damages," *Dec. Dig. (Key No.)* § 74.

<sup>6</sup> *Wilson v. City of Baltimore*, 83 Md. 203, 34 Atl. 774, 55 Am. St. Rep. 339. In an action to recover a sum stipulated in a contract as liquidated damages, no proof of actual damages is required. *Sanford v. First Nat. Bank of Belle Plaine*, 94 Iowa, 680, 63 N. W. 459. See "Damages," *Dec. Dig. (Key No.)* §§ 74, 85; *Cent. Dig.* §§ 179-187.

they clearly did not intend to liquidate the damages, no question arises in this connection, and the actual damages will be assessed on ordinary principles. But, where the contract expresses an intention that a certain sum shall be payable absolutely upon a breach, there is great difficulty, and the courts have fallen into much confusion, in determining whether the sum fixed is liquidated damages, to be enforced, or a penalty, to be relieved against. It is frequently said to be solely a matter of intention. A court of law possesses no dispensing power; it cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract, within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement.<sup>7</sup> "The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries. Whether the contract be under seal or not, if it clearly states what shall be paid by the party who breaks it, to the party to whose prejudice it is broken, the verdict in the action for the breach of it should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of the instrument ascertaining the amount of damages than it has to decide contrary to any other of its clauses."<sup>8</sup> But the weight of authority will not support this language, in the broad sense in which it is used. Where the contract has expressly designated the amount named as liquidated damages, the courts have held

<sup>7</sup> *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45. See "*Damages*," *Dec. Dig. (Key No.)* §§ 74, 85; *Cent. Dig.* §§ 179-187.

<sup>8</sup> *Crisdee v. Bolton*, 3 Car. & P. 240, per Best, C. J. See, also, *Dwinel v. Brown*, 54 Me. 468; *Brewster v. Edgerly*, 13 N. H. 275; *Clement v. Cash*, 21 N. Y. 253; *Yetter v. Hudson*, 57 Tex. 604. See "*Damages*," *Dec. Dig. (Key No.)* § 85; *Cent. Dig.* §§ 179-187.



often that it was a penalty, and relieved against it; and conversely, where the contract has called it a penalty, it has been held to be liquidated damages; and, even where the parties have manifestly supposed and intended that an exorbitant and unconscionable amount should be forfeited, the courts have carried out the intent only so far as was right and reasonable.<sup>9</sup> Contracts in terms providing for "liquidated damages," and expressly excluding all idea of a penalty, have nevertheless been construed to provide for a penalty.<sup>10</sup> This has been said to be on the ground that the parties had given a wrong name to the stipulated sum, and that it was, in substance and in fact, a penalty, and not liquidated damages.<sup>11</sup> In another case it was said that where the parties declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be a certain fixed sum to be paid by the party failing to perform, it seems absurd for the court to tell them that it has looked into the contract, and reached the conclusion that no such thing was intended, but that the intention was to name a sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement.<sup>12</sup> The cases are in great confusion, but, as has been said, "while no one can fail to discover a very great amount of conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case."<sup>13</sup> The whole difficulty lies in the failure to note the distinction between an intent to really liquidate the damages, and an intent that the sum named should be paid at all

<sup>9</sup> *Davis v. U. S.*, 17 Ct. Cl. (U. S.) 201, 215. See "*Damages*," *Dec. Dig. (Key No.)* § 85; *Cent. Dig.* §§ 179-187.

<sup>10</sup> In *Kemble v. Farren*, 6 Bing. 141, the contract provided for the payment of a fixed sum as "liquidated and ascertained damages, and not a penal sum, or in the nature thereof;" but it was held that the sum named was a penalty. See, also, *Monmouth Park Ass'n v. Warren*, 55 N. J. Law, 598, 27 Atl. 932. See "*Damages*," *Dec. Dig. (Key No.)* §§ 76-78; *Cent. Dig.* §§ 154-157.

<sup>11</sup> *Lampman v. Cochran*, 16 N. Y. 275.

<sup>12</sup> *Clement v. Cash*, 21 N. Y. 253. And see *Rolfe v. Peterson*, 2 Brown, Parl. Cas. 436.

<sup>13</sup> *Jaquith v. Hudson*, 5 Mich. 123, 133.

events. Liquidated damages are simply an estimate of the actual damages made in advance by the parties themselves, and agreed to be paid. A bona fide intent to liquidate the damages is always controlling, but a mere intent that the sum named shall be paid at all events will be disregarded unless the sum fixed be in fact liquidated damages, and not a penalty. Liquidated damages must be estimated on a basis of just compensation, and substantially limited to it, or the sum fixed becomes a penalty, no matter by what name it is called.<sup>14</sup> Parties cannot make what is, in its very nature, a penalty, stipulated damages by merely calling it so. "They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what, in its own nature, is but a penalty."<sup>15</sup> "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside."<sup>16</sup> In determining whether the parties intended to liquidate the damages, the inquiry must always be as to whether the sum is in fact in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not wholly by the language used, or the intention that it should be actually paid.<sup>17</sup> For example, if the parties should stipulate that, upon failure to deliver a box of cigars on a day named, \$1,000 should be paid "as liquidated damages, and not as a penalty," it would be absurd to say that they intended to liquidate the damages, and did not intend to fix a penalty, their language to the contrary notwithstanding. The language used merely imparts an intention that the sum named shall be paid. Liquidated damages must be intended as compensation for losses arising from a breach, or they are not liquidated damages. Clearly, the \$1,000 was not intended as compensation. While courts of

<sup>14</sup> *Jaquith v. Hudson*, 5 Mich. 123. See "Damages," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* § 157.

<sup>15</sup> *Jaquith v. Hudson*, 5 Mich. 123, 136.

<sup>16</sup> *Myer v. Hart*, 40 Mich. 517, 523, 29 Am. Rep. 553. See "Damages," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* § 157.

<sup>17</sup> *May v. Crawford*, 142 Mo. 390, 44 S. W. 260. See "Damages," *Dec. Dig. (Key No.)* §§ 77, 78; *Cent. Dig.* §§ 156, 157.

law gave the penalty of a bond, the parties intended that the penalty should be paid, as much as they now intend the payment of liquidated damages, but it was nevertheless relieved against in equity, and the same jurisdiction is now exercised by courts of law. This jurisdiction is not confined to relieving against penalties in bonds, but extends to penalties in other forms of contracts as well. In short, stipulations for the payment of liquidated damages will be enforced; stipulations for the payment of penalties will not, no matter by what name they are called.

It must be noted that either party, the plaintiff as well as the defendant, has the right to show that the stipulated sum is a penalty, and not liquidated damages. When the performance of a contract is secured by a penalty, the damages are not limited by it, but may be either greater or less. The actual damages are recoverable.<sup>18</sup> Such contracts differ from penal bonds in that they contain an agreement upon which an action may be maintained, whereas in penal bonds the only agreement is to pay the penalty.

### **SAME—RULES OF CONSTRUCTION**

51. An intention to liquidate the damages is controlling. In seeking to ascertain the real intent, the courts lean strongly towards a construction that the sum fixed is a penalty, rather than liquidated damages. The language of the parties is not conclusive, and will be strictly construed.
52. Where the stipulated sum is wholly collateral to the object of the contract, and is evidently inserted in *terrorem* as security for performance, it will be construed to be a penalty.

<sup>18</sup> *Noyes v. Phillips*, 60 N. Y. 408. See "*Damages*," *Dec. Dig. (Key No.)* §§ 85, 86; *Cent. Dig.* §§ 179-182.

53. Where the stipulated sum is to be paid on the non-payment of a less amount, or on failure to do something of less value, it will generally be construed to be a penalty.
54. Where the stipulated sum is to be paid on breach of a contract of such a nature that the damages arising from a breach may be either much greater or much less than the sum fixed, it will be construed to be a penalty.
55. Where the stipulated sum is to be paid on the breach of a contract of such a nature that the damages resulting from a breach would be uncertain, and incapable or difficult of being estimated by any definite standard, it will generally be construed to be liquidated damages, if reasonable in amount.
56. Where the stipulated sum is to be paid on the breach of a contract of such a nature that the damages arising from a breach are capable of exact measurement by a definite standard, the sum fixed, if materially variant from the actual damages, will usually be regarded as a penalty; but where such sum is fixed to cover contemplated consequential losses, not recoverable under legal rules, and is not more than a reasonable compensation therefor, it may be sustained as liquidated damages.
57. Where the contract provides that a certain sum, deposited to secure performance, shall be forfeited for nonperformance, the sum deposited, if reasonable in amount, will be construed to be liquidated damages.
- Where the stipulated sum is to be paid on any breach of a contract containing several stipulations of widely different degrees of importance, it is usually held to be a penalty.

59. A sum stipulated to be paid upon a breach of contract cannot be recovered as liquidated damages upon a partial breach, where the other party has accepted part performance.
60. A sum stipulated to be paid in evasion of the usury laws will be regarded as a penalty.

*General Rule of Construction—Form of Contract*

An intention to liquidate damages is always controlling, and courts and juries are confined to the sum fixed in assessing damages for a breach. But the intent must be to liquidate damages in the technical sense already explained. A mere intent that the sum fixed shall be paid, however strongly expressed, is insufficient. If the parties, in assessing their own damages, disregard the fundamental principle that damages are a compensation for losses sustained, the sum fixed is not liquidated damages.<sup>19</sup> It is intrinsically a penalty, and the parties cannot make it anything else by giving it a different name, and stipulating that it shall be paid. When the sum fixed, however, is not an unreasonable compensation for a breach, the question remains whether it was intended as liquidated damages or a penalty. This is a question of law for the court. This intent must be ascertained from the language used, interpreted in the light of surrounding circumstances.<sup>20</sup> The use of the words "penalty" or "forfeit," on the one hand, or "liquidated damages," on the other, is not conclusive.<sup>21</sup> Where there is doubt whether the contract provides for a penalty or for liquidated damages, the former

<sup>19</sup> *Doane v. Chicago City Ry. Co.*, 51 Ill. App. 353; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671. See "Damages," *Dec. Dig. (Key No.)* §§ 77, 78; *Cent. Dig.* §§ 156, 157.

<sup>20</sup> *Phoenix Iron Co. v. United States*, 39 Ct. Cl. (U. S.) 526; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 86 N. W. 760, 85 Am. St. Rep. 473. See "Damages," *Dec. Dig. (Key No.)* § 77; *Cent. Dig.* § 156.

<sup>21</sup> *MERICA v. BURGET*, 36 Ind. App. 453, 75 N. E. 1083, *Cooley, Cas. Damages*, 139. See "Damages," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* § 157.

construction will be favored.<sup>22</sup> Nevertheless, the language used is a guide, and may turn the scales in doubtful cases.

There are four forms of contracts in which the question under discussion is usually presented:

First. The contract may be to do or refrain from doing a particular thing, or, in the alternative, to pay a stipulated sum of money. If it was really intended to give the party an option to do the thing or pay the money, the stipulated sum cannot properly be called either a penalty or liquidated damages. If the party perform either alternative, the contract is not broken, and the question under discussion does not arise. Nevertheless, this form of contract may be but a cloak to cover a penalty, in which case the court will relieve against it. *Prima facie*, however, it is an alternative contract.<sup>23</sup>

Second. The contract may be in the form of a common-law bond. In this form of contract the real object of the parties is expressed in the condition. There is no express promise to do anything, but performance is secured under pain of the penalty. *Prima facie*, the sum stipulated in a bond is a penalty; but, nevertheless, it has sometimes been held to be liquidated damages.<sup>24</sup>

Third. The contract may bind the parties to do or refrain from doing a certain thing, and provide that, in case of default, a certain sum shall be paid as a penalty. *Prima facie*, the sum named in this class of contracts is a penalty; but the presumption is not so strong as in the case of bonds, and it has been frequently held to be liquidated damages.<sup>25</sup>

<sup>22</sup> *Shute v. Taylor*, 5 Metc. (Mass.) 61; *Cushing v. Drew*, 97 Mass. 445; *Amanda Gold-Min. & Mill. Co. v. People's Min. & Mill. Co.*, 28 Colo. 251, 64 Pac. 218. The provision must be construed to be either penalty or liquidated damages. It cannot be held for some purposes to be penalty and for others liquidated damages. *Steer v. Brown*, 106 Ill. App. 361. See "*Damages*," *Dec. Dig. (Key No.)* § 76; *Cent. Dig.* § 155.

<sup>23</sup> See post, p. 220.

<sup>24</sup> *Studabaker v. White*, 31 Ind. 212, 99 Am. Dec. 628; *Fisk v. Fowler*, 10 Cal. 512; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Clark v. Barnard*, 108 U. S. 436, 453, 2 Sup. Ct. 878, 27 L. Ed. 780. See "*Damages*," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* §§ 157-163.

<sup>25</sup> *Suth. Dam.* § 284.

Fourth. The agreement may be in the same form as the last, except the stipulated sum is called "liquidated damages" or a "forfeiture." This language will be given its literal effect only where the sum named is in fact reasonable compensation for a breach. In that case it would probably overcome the leaning of the courts towards construing all such stipulations to provide for penalties. In all other cases it would nevertheless be held to be a penalty. Stipulations for liquidated damages are strictly construed.<sup>26</sup>

#### *Collateral Sum in Terrorem*

Where the sum stipulated to be paid upon a breach of contract is wholly collateral to the object of the contract, and is so excessive as to show clearly that it was not fixed on a basis of compensation, it is evident that it was inserted, in terrorem, to secure performance, and it therefore falls within the definition of "penalty" given in the black letter text. The ordinary penal bond is an illustration of this class of cases. Such bonds are given to secure a variety of agreements, such as to submit to arbitration,<sup>27</sup> to convey land,<sup>28</sup> or to faithfully perform the duties of an office. The penalty is usually fixed at twice the estimated actual damages likely to result from a breach. Where defendant agreed to let plaintiff have the use of a certain building so long as it stood, and gave him a note payable upon a breach, it was held to be a penalty.<sup>29</sup> An agreement to return a lease loaned within a certain time, or in default thereof to pay \$3,000, was held to provide for a penalty,

<sup>26</sup> *Grand Tower Min. Mfg. & Transp. Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71; *Hamilton v. Moore*, 33 U. C. Q. B. 520. See "Damages," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* §§ 157-163.

<sup>27</sup> *Henry v. Davis*, 123 Mass. 345. The same rule is applied to an ordinary contract. *Spear v. Smith*, 1 Denio (N. Y.) 464; *Henderson v. Cansler*, 65 N. C. 542. See "Damages," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* §§ 157-163.

<sup>28</sup> *Brown v. Bellows*, 4 Pick. (Mass.) 179; *Robeson v. Whitesides*, 16 Serg. & R. (Pa.) 320; *Burr v. Todd*, 41 Pa. 206. See "Damages," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* §§ 157-163.

<sup>29</sup> *Merrill v. Merrill*, 15 Mass. 488. See "Damages," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* §§ 157-163.

as the sum named was wholly collateral to the object of the contract.<sup>30</sup>

In some instances bonds to secure the performance of statutory duties, such as liquor dealers' bonds, have been regarded as providing for liquidated damages,<sup>31</sup> though in Minnesota they are regarded as providing for a penalty.<sup>32</sup>

*Sum Payable on Nonpayment of Smaller Sum*

"Where a large sum, which is not the actual debt, is agreed to be paid in case of a default in the payment of a less sum, which is the real debt, such larger sum is always a penalty."<sup>33</sup> This is because it is evident that the principle of compensation has been departed from.<sup>34</sup> But where the larger sum is the real debt, and the debtor has simply an option to discharge it by the payment of a less sum, if paid at a particular term or in a specified manner, upon failure to pay the smaller sum at the time and in the manner specified, payment of the larger sum may be enforced.<sup>35</sup> In such a case, the question under

<sup>30</sup> *Burrage v. Crump*, 48 N. C. 330. See "*Damages*," *Dec. Dig.* (Key No.) § 78; *Cent. Dig.* §§ 157-163.

<sup>31</sup> *State v. Corron*, 73 N. H. 434, 62 Atl. 1044; *Lyman v. Shenandoah Social Club*, 39 App. Div. 459, 57 N. Y. Supp. 372. See "*Damages*," *Dec. Dig.* (Key No.) § 78; *Cent. Dig.* §§ 157-163.

<sup>32</sup> *State v. Larson*, 83 Minn. 124, 86 N. W. 3, 54 L. R. A. 487. See "*Damages*," *Dec. Dig.* (Key No.) § 78; *Cent. Dig.* §§ 157-163.

<sup>33</sup> *Suth. Dam.* § 288.

<sup>34</sup> *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82, 61 C. C. A. 138. See "*Damages*," *Dec. Dig.* (Key No.) § 80; *Cent. Dig.* §§ 170-175.

<sup>35</sup> *Mayne*, *Dam.* § 166; *Suth. Dam.* § 288; *Thompson v. Hudson*, L. R. 4 H. L. 1, L. R. 2 Eq. 612; *Ashtown's Lessee v. White*, 11 Ir. Law R. 400; *McNitt v. Clark*, 7 Johns. (N. Y.) 465; *Carter v. Corley*, 23 Ala. 612; *Berrinkott v. Traphagen*, 39 Wis. 219. But see *Longworth v. Askren*, 15 Ohio St. 370. We regard this decision as unsound. A note providing that it may be discharged by payment of a sum less than its face, if paid before maturity, is valid; and the larger sum is not a penalty. *Jordan v. Lewis*, 2 Stew. (Ala.) 426; *Carter v. Corley*, 23 Ala. 612; *Waggoner v. Cox*, 40 Ohio St. 539, 543; *Campbell v. Shields*, 6 Leigh (Va.) 517. Contra, *Moore v. Hylton*, 16 N. C. 429. A provision in a note that, if it is not paid at maturity, a certain further sum should be paid as liquidated damages for delay, has been sustained, when such ad-



not as a penalty; for, the nearer the contract is completed, the greater are the damages in case of failure. \* \* \* The policy of the law will not permit parties to make that liquidated damages, by calling it such in their contract, which in its nature is clearly a penalty or forfeiture for nonperformance. While it allows them, in certain cases, to fix their own damages, it will in no case permit them to evade the law by agreement."<sup>41</sup>

Generally, when the amount stipulated to be paid by the defaulting party is disproportionate to the probable damages, the provision will be construed as for a penalty and not for liquidated damages.<sup>42</sup>

Contracts providing that an employee shall forfeit all wages due him if he wrongfully quits the service belong to this class of cases, and will be regarded as stipulating for a penalty,<sup>43</sup> though a different view has been taken of the contract where the stipulation is for a forfeiture of a definite proportion of the wages not unreasonable in amount.<sup>44</sup> And, generally, where a contract provides for payment in installments, and stipulates that a certain proportion shall be retained from each installment, the whole to be forfeited upon

<sup>41</sup> See, also, *Stony Creek Lumber Co. v. Fields & Co.*, 102 Va. 1, 45 S. E. 797.

<sup>42</sup> *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676; *Doane v. Chicago City Ry. Co.*, 51 Ill. App. 353; *Bradstreet v. Baker*, 14 R. I. 546; *Baird v. Tolliver*, 6 Humph. (Tenn.) 186, 44 Am. Dec. 298; *Menges v. Milton Piano Co.*, 96 Mo. App. 283, 70 S. W. 250; *Zimmerman v. Conrad* (Mo. App.) 74 S. W. 139; *Blunt v. Egeland*, 104 Minn. 351, 116 N. W. 653; *Lee v. Carroll Normal School Co.*, 1 Neb. (Unof.) 681, 96 N. W. 65; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 86 N. W. 760, 85 Am. St. Rep. 473; *Coker v. Brevard*, 90 Miss. 64, 43 South. 177; *Davis v. United States*, 17 Ct. Cl. (U. S.) 201. See "Damages," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* §§ 170-175.

<sup>43</sup> *Richardson v. Woehler*, 26 Mich. 90. See "Damages," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* § 175.

<sup>44</sup> *Wilson v. Godkin*, 136 Mich. 106, 98 N. W. 985, where the contract provided for a forfeiture of six days pay; *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865. See "Damages," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* § 175.

a breach, the sum retained is considered a penalty.<sup>45</sup> So, too, a clause in a contract fixing a sum as liquidated damages will be construed as providing a penalty, even if not excessive, if no injury has resulted from a breach of the condition for which the damages were provided.<sup>46</sup>

*Stipulated Sum Where Damages Are Uncertain*

Where the damages resulting from a breach of contract cannot be measured by any definite pecuniary standard, as by market value or the like, but are wholly uncertain, the law favors a liquidation of the damages by the parties themselves; and where they stipulate for a reasonable amount, it will be enforced.<sup>47</sup> But, even if the damages are uncertain, if there is a glaring disproportion between the sum agreed to be paid in default of performance, and the probable advantages of performance, it will be deemed a penalty.<sup>48</sup> Here, as in all

\* *Savannah & C. R. Co. v. Callahan*, 56 Ga. 331; *Henderson-Boyd Lumber Co. v. Cook*, 149 Ala. 226, 42 South. 838; *Kerslake v. McInnis*, 113 Wis. 659, 89 N. W. 895; *Jemison v. Gray*, 29 Iowa, 537; *Potter v. McPherson*, 61 Mo. 240; *Dullaghan v. Fitch*, 42 Wis. 679; *Jackson v. Cleveland*, 19 Wis. 400. But where the sum was not excessive, it has been allowed as liquidated damages. See *Elizabethtown & P. R. Co. v. Geoghegan*, 9 Bush (Ky.) 56; *Geiger v. Western Maryland Railroad Co.*, 41 Md. 4; *Easton v. Pennsylvania & O. Canal Co.*, 13 Ohio, 79. See "*Damages*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* §§ 170-175.

\* *Dunn v. Morgenthau*, 73 App. Div. 147, 76 N. Y. Supp. 827, affirmed in 175 N. Y. 518, 67 N. E. 1081. See "*Damages*," *Dec. Dig. (Key No.)* §§ 80, 85; *Cent. Dig.* §§ 170-187.

\* *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 86 N. W. 760, 85 Am. St. Rep. 473; *MERICA v. BURGET*, 36 Ind. App. 453, 75 N. E. 1083, *Cooley, Cas. Damages*, 139; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Powell v. Burroughs*, 54 Pa. 329; *Emery v. Boyle*, 200 Pa. 249, 49 Atl. 779; *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149; *Ross v. Loescher*, 152 Mich. 386, 116 N. W. 193, 125 Am. St. Rep. 418; *City of New Britain v. New Britain Tel. Co.*, 74 Conn. 326, 50 Atl. 881, 1015; *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; *May v. Crawford*, 150 Mo. 504, 51 S. W. 693. See "*Damages*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* §§ 164-169.

\* *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 86 N. W. 760, 85 Am. St. Rep. 473. See "*Damages*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* §§ 170-175.

cases the facts of the transaction must not negative an intention to fix a sum which would be reasonable compensation. The uncertainty spoken of must be as to the actual nature and extent of the damage; not as to the legal measure to be applied. Stipulations for liquidated damages have been upheld in actions for breach of marriage promise,<sup>49</sup> breach of contract for the sale of property of uncertain value,<sup>50</sup> breach of agreement not to carry on business,<sup>51</sup> failure to abate a

<sup>49</sup> *Lowe v. Peers*, 4 Burrows, 2225; *Abrams v. Kounts*, 4 Ohio, 214. See "Damages," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* § 157.

<sup>50</sup> *Gammon v. Howe*, 14 Me. 250; *Chamberlain v. Bagley*, 11 N. H. 234; *Mead v. Wheeler*, 13 N. H. 351; *Main v. King*, 10 Barb. (N. Y.) 59; *Streeper v. Williams*, 48 Pa. 450; *Durst v. Swift*, 11 Tex. 273; *Yenner v. Hammond*, 36 Wis. 277; *Burk v. Dunn*, 55 Ill. App. 25. This rule was applied to a contract to exchange farms which provided that the party failing to perform should "forfeit and pay as damages" a fixed sum, and the sum was held liquidated damages. *Gobble v. Linder*, 76 Ill. 157. In New York it is held that the damages for breach of an ordinary contract for the sale or exchange of lands are not uncertain, and a stipulation for liquidated damages cannot be sustained upon this ground. *Noyes v. Phillips*, 60 N. Y. 408; *Richards v. Edick*, 17 Barb. 260; *Laurea v. Bernauer*, 33 Hun, 307. But if the sum fixed is reasonable in amount, and clearly intended as compensation, it is recoverable as liquidated damages. *Slosson v. Beadle*, 7 Johns. 72; *Hasbrouck v. Tappen*, 15 Johns. 200; *Knapp v. Maltby*, 13 Wend. 587. Otherwise not. *Dennis v. Cummins*, 3 Johns. Cas. 297, 2 Am. Dec. 160. Where a grantor agreed, in case the grantee was evicted, to refund the consideration with interest, that sum was held to be liquidated damages. *Bradshaw v. Craycraft*, 3 J. J. Marsh. (Ky.) 77. An interest in a partnership is sufficiently uncertain in value to sustain a stipulation for liquidated damages. *Maxwell v. Allen*, 78 Me. 32, 2 Atl. 386, 57 Am. Rep. 783; *Lynde v. Thompson*, 2 Allen (Mass.) 456. For failure to purchase a business as agreed, \$25,000 was held to be liquidated damages. *Woodbury v. Turner*, Day & Woolworth Mfg. Co., 96 Ky. 459, 29 S. W. 295. See "Damages," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 168.

<sup>51</sup> A sum agreed to be paid upon breach of an agreement not to carry on a particular trade, business, or profession within certain limits or within a specified time is nearly always regarded as liquidated damages. *Atkins v. Kinnier*, 4 Exch. 776; *Jaquith v. Hudson*, 5 Mich. 123; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475; *Robinson v. Centenary Fund & Preachers' Aid Soc.*, 68 N. J. Law, 723, 54 Atl. 416; *Tobler v.*

nuisance,<sup>52</sup> delay in the performance of contracts,<sup>53</sup> disclosure

Austin, 23 Tex. Civ. App. 99, 53 S. W. 706; Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 Atl. 845; *MERICA v. BURGET*, 36 Ind. App. 453, 75 N. E. 1083, Cooley, Cas. Damages, 139; Canady v. Knox, 43 Wash. 567, 86 Pac. 930; Mott v. Mott, 11 Barb. (N. Y.) 127; Applegate v. Jacoby, 9 Dana (Ky.) 206; Dakin v. Williams, 17 Wend. (N. Y.) 447; Williams v. Dakin, 22 Wend. (N. Y.) 210; DeGroff v. American Linen-Thread Co., 24 Barb. (N. Y.) 375; Nobles v. Bates, 7 Cow. (N. Y.) 307; Smith v. Smith, 4 Wend. (N. Y.) 468; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102; Cushing v. Drew, 97 Mass. 445 (contra, Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158; Mueller v. Kleine, 27 Ill. App. 473; California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511; Streeter v. Rush, 25 Cal. 67; Grasselli v. Lowden, 11 Ohio St. 349; Newman v. Wolfson, 69 Ga. 764; Lightner v. Menzel, 35 Cal. 452; Bigony v. Tyson, 75 Pa. 157; Barry v. Harris, 49 Vt. 392; Stevens v. Pillsbury, 57 Vt. 205, 52 Am. Rep. 121 (Smith's Adm'rs v. Wainwright's Adm'rs, 24 Vt. 97, overruled); Stewart v. Bedell, 79 Pa. 336 (but see Moore v. Colt, 127 Pa. 289, 18 Atl. 8, 14 Am. St. Rep. 845); Johnson v. Gwinn, 100 Ind. 466; Holbrook v. Tobey, 66 Me. 410, 22 Am. Rep. 581; Cheddick's Ex'r v. Marsh, 21 N. J. Law, 463; Hoagland v. Segur, 38 N. J. Law, 230; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746. But see Wilcus v. Kling, 87 Ill. 107. In *Wilkinson v. Colley*, 164 Pa. 35, 30 Atl. 286, 26 L. R. A. 114, such a contract by a physician was held to provide for a penalty. Such agreements are not considered alternative. *Stewart v. Bedell*, 79 Pa. 336. Nor can the stipulation for liquidated damages be defeated on the ground that, the contract being a continuing one, the sum fixed is payable on any one of various breaches of different importance. *Atkins v. Kinnier*, 4 Exch. 776; *Galworthy v. Strutt*, 1 Exch. 659; *Green v. Price*, 13 Mees. & W. 695; *Price v. Green*, 16 Mees. & W. 346; *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551; *Streeter v. Rush*, 25 Cal. 67; *Cushing v. Drew*, 97 Mass. 445; *Grasselli v. Lowden*, 11 Ohio St. 349; *Moore v. Colt*, 127 Pa. 289, 18 Atl. 8, 14 Am. St. Rep. 845; *Leary v. Laffin*, 101 Mass. 334; *Dakin v. Williams*, 17 Wend. (N. Y.) 447; *Spicer v. Hoop*, 51 Ind. 365; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348. In *Little v. Banks*, 85 N. Y. 258, the defendant was the publisher of the New York Court of Appeals Reports. He had contracted to keep them for sale, and to sell to dealers as required; and \$100 was stipulated to be paid as liquidated damages for a breach. It was held that

<sup>52</sup> *Grasselli v. Lowden*, 11 Ohio St. 349. See "*Damages*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 164.

<sup>53</sup> See note 53 on following page.

of trade secrets,<sup>54</sup> and in various other cases.<sup>55</sup> Anything, in fact, that tends to make the damages difficult to estimate,

this sum could be recovered for a breach, though the actual damages for failure to deliver a single copy might be very much less than a failure to deliver a large number. See "*Damages*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 166.

<sup>54</sup> A stipulation in a building contract for the payment of a reasonable sum for each day or week the work is delayed beyond the agreed time will be sustained as liquidated damages for the delay. *Fletcher v. Dyche*, 2 Term R. 32; *Legge v. Harlock*, 12 Q. B. 1015; *Crux v. Aldred*, 14 Wkly. Rep. 656; *Chapman Decorative Co. v. Security Mut. Life Ins. Co.*, 149 Fed. 189, 79 C. C. A. 137; *Stephens v. Essex County Park Commission*, 143 Fed. 884, 75 C. C. A. 60; *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267; *Mueller v. Kleine*, 27 Ill. App. 473; *Curtis v. Brewer*, 17 Pick. (Mass.) 513; *Folsom v. McDonough*, 6 Cush. (Mass.) 208; *Hall v. Crowley*, 5 Allen (Mass.) 304, 81 Am. Dec. 745; *Bridges v. Hyatt*, 2 Abb. Prac. (N. Y.) 449; *O'Donnell v. Rosenberg*, 14 Abb. Prac. N. S. (N. Y.) 59; *Farnham v. Ross*, 2 Hall (N. Y.) 187; *Weeks v. Little*, 47 N. Y. Super. Ct. 1; *Worrell v. McClinaghan*, 5 Strob. (S. C.) 115; *Welch v. McDonald*, 85 Va. 500, 8 S. E. 711; *Jones v. Reg.*, 7 Can. Sup. Ct. 570; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626. Contra, *Wilcus v. Kling*, 87 Ill. 107; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890 (under Code Civ. Proc. § 1671); *Brennan v. Clark*, 29 Neb. 385, 45 N. W. 472. See *Jennings v. Willer* (Tex. Civ. App.) 32 S. W. 24. Cf. *Mills v. Paul* (Tex. Civ. App.) 30 S. W. 558; *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467. See, generally, *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230, 26 N. E. 256; *Pettis v. Bloomer*, 21 How. Prac. (N. Y.) 317; *De Graff Vrieling & Co. v. Wickham*, 89 Iowa, 720, 52 N. W. 503, 57 N. W. 420; *Erickson v. Green*, 47 Wash. 613, 92 Pac. 449; *Lamson v. City of Marshall*, 133 Mich. 250, 95 N. W. 78; *Dunn v. Morgenthau*, 175 N. Y. 518, 67 N. E. 1081; *O'Brien v. Anniston Pipe-Works*, 93 Ala. 582, 9 South. 415. But, where the work is abandoned, the stipulated sum cannot be recovered for an indefinite time. *Hahn v. Horstman*, 12 Bush (Ky.) 249; *Greer v. Tweed*, 13 Abb. Prac. N. S. (N. Y.) 427; *Colwell v. Foulks*, 36 How. Prac. (N. Y.) 306. If the intent of the parties is doubtful, the provision will be regarded as a penalty. *Furnace Co. v. Willins Mfg. Co.*, 181 Ill. 582, 54 N. E. 987. A gross sum payable at once on delay in completing

<sup>55</sup> *Nessle v. Reese*, 29 How. Prac. (N. Y.) 382; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Reindel v. Schell*, 4 C. B. (N. S.) 97. See "*Damages*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* §§ 164-169.

<sup>56</sup> See note 55 on following page.

such as the absence of witnesses, or the difficulty of procuring testimony, may be considered as bearing upon the motive in stipulating damages.<sup>56</sup>

*Stipulated Sum Where Damages Are Certain*

Where damages can be easily and precisely determined by a definite pecuniary standard as by proof of market values, but the parties have stipulated for a much larger sum, such sum will usually be held to be a penalty; for it is evident

a building beyond a certain time, is a penalty. *Tayloe v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384; *Savannah & C. R. Co. v. Callahan*, 56 Ga. 331. Contra, *Allen v. Brazier*, 2 Bailey (S. C.) 293. The sum fixed must be reasonable compensation for the actual damage. *Clements v. Schuylkill River E. S. Railroad Co.*, 132 Pa. 445, 19 Atl. 274, 276. The principle applies to other contracts. *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Walker v. Engler*, 30 Mo. 130; *Young v. White*, 5 Watts (Pa.) 460; *Bergheim v. Steel Co.*, L. R. 10 Q. B. 319. See "Damages," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 167.

"A stipulation liquidating the damages for the total loss of a bargain for the purchase or lease of lands will be enforced. *Leggett v. Mutual Life Ins. Co. of New York*, 50 Barb. (N. Y.) 616; *Id.*, 53 N. Y. 394; *Heard v. Bowers*, 23 Pick. (Mass.) 455; *Tingley v. Cutler*, 7 Conn. 291; *Knapp v. Maltby*, 13 Wend. (N. Y.) 587; *Slosson v. Beadle*, 7 Johns. (N. Y.) 72; *Lynde v. Thompson*, 2 Allen (Mass.) 456; *Lampman v. Cochran*, 19 Barb. (N. Y.) 388; *Id.*, 16 N. Y. 275; *Mundy v. Culver*, 18 Barb. (N. Y.) 336; *Clement v. Cash*, 21 N. Y. 253; *Hasbrouck v. Tappen*, 15 Johns. (N. Y.) 200. Or of personal property. *Pierce v. Jung*, 10 Wis. 30; *Allen v. Brazier*, 2 Bailey (S. C.) 55; *Main v. King*, 10 Barb. (N. Y.) 59; *Knowlton v. Mackay*, 29 U. C. C. P. 601. An agreement to forfeit tuition fees paid in advance in case of expulsion from school provides for liquidated damages, and not a penalty. *Fessman v. Seeley* (Tex. Civ. App.) 30 S. W. 268. Forfeiture of reasonable proportion of wages for quitting without notice will be upheld. *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865. A contract of employment providing that the employee shall pay \$1,000 as liquidated damages, in case he shall become intoxicated, provides for liquidated damages, and not a penalty, although it is possible for a breach to occur with no actual damages other than nominal. *Keeble v. Keeble*, 85 Ala. 532, 5 South. 149. See "Damages," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* §§ 164-169.

"*Cothel v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713. See "Damages," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* §§ 164-169.

that the principle of compensation has been disregarded.<sup>57</sup> The principle here is the same as where a smaller sum of money is secured by a larger.<sup>58</sup> Whenever the damages can be ascertained with reasonable certainty, the strong tendency is to regard a stipulated sum materially variant therefrom as a penalty. We have seen, however, that the damages recoverable under legal rules seldom constitute complete indemnity, and in cases of contracts, therefore, the law permits the parties to provide for this contingency. They may stipulate for a compensation for losses which the law would regard as too remote or uncertain to be considered, and if the stipulation is reasonable, it will be enforced as liquidated damages.<sup>59</sup> This is but an application of the rule that the

<sup>57</sup> *Lee v. Overstreet's Adm'r*, 44 Ga. 507; *Hahn v. Horstman*, 12 Bush (Ky.) 249; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *North & South Rolling Stock Co. v. O'Hara*, 73 Ill. App. 691; *Hill v. Wertheimer-Swartz Shoe Co.*, 150 Mo. 483, 51 S. W. 702. See, also, *O'KEEFE v. DYER*, 20 Mont. 477, 52 Pac. 196, *Cooley, Cas. Damages*, 142, where there was a breach of an agreement to convey land. See "*Damages*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* §§ 164-169.

<sup>58</sup> "There are no peculiar reasons why a stipulated sum should be treated as a penalty for exceeding just compensation for a default in the payment of money, and not be so treated in case of a different agreement, where the excess is capable of being made equally manifest." *Suth. Dam.* § 289; *Fisher v. Bidwell*, 27 Conn. 363. Where parties bind themselves in a certain sum to abide by an award, the sum is a penalty, and only the award, with interest, can be recovered. *Stewart v. Grier*, 7 Houst. (Del.) 378, 32 Atl. 328. See "*Damages*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* §§ 164-169.

<sup>59</sup> *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527; *Nielson v. Read* (D. C.) 12 Fed. 441; *Gallo v. McAndrews* (D. C.) 29 Fed. 715; *Hodges v. King*, 7 Metc. (Mass.) 583; *Manice v. Brady*, 15 Abb. Prac. (N. Y.) 173; *Durst v. Swift*, 11 Tex. 273; *Walker v. Engler*, 30 Mo. 130; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Easton v. Pennsylvania & O. Canal Co.*, 13 Ohio, 80; *Bradshaw v. Craycraft*, 3 J. J. Marsh. (Ky.) 79; *Ex parte Hodges*, 24 Ark. 197; *Talcott v. Marston*, 3 Minn. 339 (Gil. 238); *Shreve v. Brereton*, 51 Pa. 175; *Knapp v. Maltby*, 13 Wend. (N. Y.) 587; *Powell v. Burroughs*, 54 Pa. 329; *Johnston v. Cowan*, 59 Pa. 275; *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149. But if

damages for a breach of contract are such as were contemplated at the time the contract was made.

*Sum Deposited to Be Forfeited on Breach*

Where a sum is deposited, and the contract declares that it shall be forfeited for nonperformance, if reasonable in amount, it will be enforced as liquidated damages.<sup>60</sup> In *Wallis v. Smith*<sup>61</sup> it was said, in this connection: "In that

the sum fixed varies materially from a just compensation, or if the intention is doubtful, the sum will be held a penalty. *Dennis v. Cummins*, 3 Johns. Cas. (N. Y.) 297, 2 Am. Dec. 160; *Lindsay v. Anesley*, 28 N. C. 188; *Mills v. Fox*, 4 E. D. Smith (N. Y.) 230; *Esmond v. Van Benschoten*, 12 Barb. (N. Y.) 366; *Baird v. Tolliver*, 6 Humph. (Tenn.) 186, 44 Am. Dec. 298. A provision in a lease for \$5,000 damages, to cover interruption of earnings and other losses in addition to unpaid rent, in case of breach by the lessee, when, on an actual breach, no substantial damage has been suffered, must be held to be a penalty. *Gay Mfg. Co. v. Camp*, 25 U. S. App. 134, 13 C. C. A. 137, 65 Fed. 794. Where the provisions of payment in an agreement for the use of a certain machine are that the lessee shall keep an account of the work done by the machine, and pay ratably therefor, "and, if said lessee shall fail or neglect to keep an account" of the work so done, "the lessor may, at his option, either" employ some suitable person to take the account for him, or "charge said lessee, in lieu of" the ratable price named, "the sum of five dollars per day for each of said machines," the alternative will not be construed as a penalty, but as fixing upon a roughly-estimated per diem equivalent, where the difference is not too great to admit of that conclusion. *Standard Button-Fastening Co. v. Breed*, 163 Mass. 10, 39 N. E. 346. In *Glynn v. Moran*, 174 Mass. 233, 54 N. E. 535, where plaintiff was employed by defendant for ten years at a salary of \$2,000 a year and a percentage on the net profits, a clause in the contract providing that if defendant discontinued the business plaintiff should receive \$1,500 a year till the end of the ten years was a provision for liquidated damages. See "*Damages*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* §§ 164-169.

<sup>60</sup> *Reilly v. Jones*, 1 Bing. 302; *Hinton v. Sparkes*, L. R. 3 C. P. 161; *Lea v. Whitaker*, L. R. 8 C. P. 70; *Magee v. Lavell*, L. R. 9 C. P. 107; *Swift v. Powell*, 44 Ga. 123; *Perzell v. Shook*, 53 N. Y. Super. Ct. 501; *Mathews v. Sharp*, 99 Pa. 560; *Eakin v. Scott*, 70 Tex. 442, 7 S. W. 777; *Longobardi v. Yuliano*, 33 Misc. Rep. 472, 67 N. Y. Supp. 902. See *Stillwell v. Temple*, 28 Mo. 156. See "*Damages*," *Dec. Dig. (Key No.)* § 81; *Cent. Dig.* § 177.

<sup>61</sup> Ch. Div. 243.



there seems to me to be great good sense, and for this reason: that if a fund is set apart to meet a particular contingency, which is described, and that contingency arises, it is difficult to say that the stakeholder, or other person having the fund, is not to hand it over at once to the person who claims it under the contingency that has happened." The sum deposited must be reasonable,<sup>62</sup> and if the deposit largely exceeds the ascertainable damages it will be regarded as penalty.<sup>63</sup>

On the other hand, where on the sale of property to be paid for on installments it is provided that on default in payments prior payments shall be forfeited, the provision has generally been regarded as in the nature of a penalty, against which relief will be granted, on payment of the amount actually due.<sup>64</sup>

#### *Sum Stipulated for Breach of Contract for Several Things*

Where a contract contains stipulations for several things of widely different degrees of importance, it is obvious that a fixed sum made payable on the breach of any of them cannot be based on the principle of compensation, but should be regarded as penalty.<sup>65</sup>

<sup>62</sup> *Chaudé v. Shepard*, 122 N. Y. 397, 25 N. E. 358. It was held in this case, however, that the rule only applied in cases where the deposit was made in part performance of the contract, and not where it was mere security. But see *In re Dagenham (Thames) Dock Co.*, 8 Ch. App. 1022. See "*Damages*," *Dec. Dig. (Key No.)* § 81; *Cent. Dig.* § 177.

<sup>63</sup> *Schreiber v. Cohen*, 38 Misc. Rep. 546, 77 N. Y. Supp. 1081. See "*Damages*," *Dec. Dig. (Key No.)* §§ 80, 81; *Cent. Dig.* §§ 170-177.

<sup>64</sup> *Johnston v. Whittemore*, 27 Mich. 463; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257; *Barnes v. Clement*, 12 S. D. 270, 81 N. W. 301; *Sherburne v. Hirst* (C. C.) 121 Fed. 998. And see *Nichols v. Haines*, 98 Fed. 692, 39 C. C. A. 235. But, contra, see *Keefe v. Fairfield*, 184 Mass. 334; 68 N. E. 342. See "*Damages*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* §§ 170-175.

<sup>65</sup> *Astley v. Weldon*, 2 Bos. & P. 346; *Boulware v. Crohn*, 122 Mo. App. 571, 99 S. W. 796; *Watts v. Sheppard*, 2 Ala. 425; *Cheddick's Adm'r v. Marsh*, 21 N. J. Law, 463; *Dailey v. Litchfield*, 10 Mich. 29; *People v. Central Pac. R. Co.*, 76 Cal. 29, 18 Pac. 90; *KECK v. BIEBER*, 148 Pa. 645, 24 Atl. 170, 33 Am. St. Rep. 846,

This is very clear where the damages for some breaches can be accurately measured and the sum fixed is in excess of that sum.<sup>66</sup> Thus, where one of the stipulations is for the payment of a sum of money, and this sum is less than the stipulated sum, the latter is clearly a penalty.<sup>67</sup>

It is equally true when the damages cannot be accurately measured for any breach, for it is logically certain that one sum cannot be a fair compensation for a breach of either of two stipulations of widely different value or importance. In *Lyman v. Babcock*<sup>68</sup> it was said: "Where the sum is agreed to be paid for any of several breaches of the contract, and the damages resulting from the breach of all of them are uncertain, and there is no fixed rule for measuring them, but the breaches are apparently of various degrees of importance and injury, the cases are conflicting in the rule whether the sum should be held as a penalty or as liquidated damages. On principle we are very clear that in such a case the sum should be held as a penalty; for it appears to us that it would

*Cooley, Cas. Damages*, 147; *Chase v. Allen*, 13 Gray (Mass.) 42; *Trower v. Elder*, 77 Ill. 453; *Higginson v. Weld*, 14 Gray (Mass.) 165; *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194; *City of El Reno v. Cullinane*, 4 Okl. 457, 46 Pac. 510; *City of Madison v. American Sanitary Engineering Co.*, 118 Wis. 480, 95 N. W. 1097. But see *Wilson v. Godkin*, 136 Mich. 106, 98 N. W. 985, where it is said that the fact that the provision stipulates for damages to cover different breaches of varying importance is not conclusive that it was designed as a penalty. See "*Damages*," *Dec. Dig. (Key No.)* § 78; *Cent. Dig.* §§ 157-163.

<sup>66</sup>*Niver v. Rossman*, 18 Barb. (N. Y.) 50; *Thoroughgood v. Walker*, 47 N. C. 15; *Berry v. Wisdom*, 3 Ohio St. 241; *East Moline Co. v. Weir Plow Co.*, 95 Fed. 250, 37 C. C. A. 62; *Steer v. Brown*, 106 Ill. App. 361; *MERICA v. BURGET*, 36 Ind. App. 453, 75 N. E. 1083; *Cooley, Cas. Damages*, 139; *First Orthodox Congregational Church of Middleville, Trustees of v. Walrath*, 27 Mich. 232; *City of Brunswick v. Aetna Indemnity Co.*, 4 Ga. App. 722, 62 S. E. 475. See "*Damages*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* §§ 170-175.

<sup>67</sup>*Clement v. Cash*, 21 N. Y. 253; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Lampman v. Cochran*, 16 N. Y. 275. But see *Brewster v. Edgerly*, 13 N. H. 275. See "*Damages*," *Dec. Dig. (Key No.)* § 80; *Cent. Dig.* §§ 170-175.

<sup>68</sup>40 Wis. 503, 517.

be as unjust to sanction a recovery of the sum agreed to be paid alike for any one trivial breach, or for any one important breach, or for breach of the whole contract, as it would be to sanction such a recovery equally for damages certain and uncertain in their nature. The rule holding the sum to be a penalty in the latter case goes upon the injustice of allowing such a recovery for a less amount of actual damages ascertained or readily ascertainable. And we cannot but think that there is like injustice in allowing such a recovery equally, in case of damages, uncertain indeed, but manifestly and materially different in amount; equally for breach of part of the contract, and for breach of the entire contract. Such a rule would not only put the same value on a small part as on a large part, but would put the same value on any part as on the whole." This is believed to be a correct statement of the law, though the courts have not always found it necessary to state the rule so broadly.<sup>69</sup>

\* *Kemble v. Farren*, 6 Bing. 141; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Moore v. Colt*, 127 Pa. 289, 18 Atl. 8, 14 Am. St. Rep. 845; *Curry v. Larer*, 7 Pa. 470, 49 Am. Dec. 486; *McCullough v. Manning*, 132 Pa. 43, 18 Atl. 1080; *KECK v. BIEBER*, 148 Pa. 645, 24 Atl. 170, 33 Am. St. Rep. 846; *Cooley, Cas. Damages*, 147; *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Daily v. Litchfield*, 10 Mich. 29; *Bryton v. Marston*, 33 Ill. App. 211; *Lord v. Gaddis*, 9 Iowa, 265; *Hallock v. Slater*, 9 Iowa, 599; *Clements v. Cash*, 21 N. Y. 253; *Staples v. Parker*, 41 Barb. (N. Y.) 648; *Lansing v. Dodd*, 45 N. J. Law, 525; *Hoagland v. Segur*, 38 N. J. Law, 230; *Cheddick's Ex'r v. Marsh*, 21 N. J. Law, 463; *Brown v. Bellows*, 4 Pick. (Mass.) 179; *Shute v. Taylor*, 5 Metc. (Mass.) 61; *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; *Bignall v. Gould*, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491; *Higbie v. Farr*, 28 Minn. 439, 10 N. W. 592; *Cook v. Finch*, 19 Minn. 407 (Gil. 350); *Gower v. Saltmarsh*, 11 Mo. 271; *Nash v. Hermosilla*, 9 Cal. 585, 70 Am. Dec. 676; *Hammer v. Breidenbach*, 31 Mo. 49; *St. Louis & S. F. Ry. Co. v. Shoemaker*, 27 Kan. 677. The sum named is to be regarded as penalty rather than liquidated damages when the contract is divisible in performance and the breach of each stipulation can be easily ascertained. *St. Louis & S. F. Ry. Co. v. Shoemaker*, 27 Kan. 677. To the same effect, see *Mansur & Tebbetts Implement Co. v. Tissier Arms & Hardware Co.*, 136 Ala. 597, 33 South. 818. And see *Colonna Dry Dock Co. v. Colonna*, 108 Va. 230, 61 S. E. 770. See "*Damages*," *Dec. Dig. (Key No.)* §§ 78, 79; *Cent. Dig.* §§ 157-163, 170-175.

*Partial Breach*

A sum stipulated to be paid upon a breach of contract cannot be recovered as liquidated damages for a partial breach, for one sum cannot consistently be compensation alike for either a total or a partial breach;<sup>70</sup> and, of course, if it appears from the language used that the stipulation was meant to be applicable only to a total breach, it will be disregarded in an action for a partial breach.<sup>71</sup> But a contract containing several stipulations may be of such a nature that breach of any one of them will defeat the entire object of the contract, in which case any breach is really a total breach, and the sum named, if reasonable, may be recovered as liquidated damages.<sup>72</sup> So, also, a partial breach may justify the other party in treating the contract as at an end, and, if he does so, the sum named may be recovered; but, if he accepts part performance, it cannot.<sup>73</sup> In the latter alternative it has

<sup>70</sup> Sedg. Dam. § 415; *Whitehead v. Brothers Lodge I. O. O. F.*, 63 S. W. 873, 23 Ky. Law Rep. 29; *Grant v. Pratt & Lambert*, 52 App. Div. 540, 65 N. Y. Supp. 486. See "*Damages*," *Dec. Dig. (Key No.)* § 86; *Cent. Dig.* § 182.

<sup>71</sup> *Cook v. Finch*, 19 Minn. 407 (Gil. 350). See "*Damages*," *Dec. Dig. (Key No.)* §§ 78, 86; *Cent. Dig.* §§ 163, 182.

<sup>72</sup> The object of a contract to abstain from the use of intoxicating liquors during a certain period is defeated by a single breach, and the sum named may be recovered as liquidated damages. *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149. In an action on a bond conditioned that defendant would marry a certain woman, treat her as a wife should be treated, and give her no cause for divorce, the plaintiff need not prove a breach of all the conditions. *Stanley v. Montgomery*, 102 Ind. 102, 26 N. E. 213. The same ruling was made in an action on a contract not to employ union men, or to use union labels, or to buy or sell articles bearing union labels. *Schrader v. Lillis*, 10 Ont. 358. See "*Damages*," *Dec. Dig. (Key No.)* §§ 78, 86; *Cent. Dig.* §§ 163, 182.

<sup>73</sup> *Wibaux v. Grinnell Live Stock Co.*, 9 Mont. 154, 165, 22 Pac. 492; *Hoagland v. Segur*, 38 N. J. Law, 230; *Shute v. Taylor*, 5 Metc. (Mass.) 61; *Watt's Ex'rs v. Sheppard*, 2 Ala. 425; *Berry v. Wisdom*, 3 Ohio St. 241; *Lampman v. Cochran*, 16 N. Y. 275, per *Shankland, J.*; *Shiell v. McNitt*, 9 Paige (N. Y.) 101; *Mundy v. Culver*, 18 Barb. (N. Y.) 336. See "*Damages*," *Dec. Dig. (Key No.)* §§ 78, 86; *Cent. Dig.* §§ 163, 182.

been held, in some cases, that the sum fixed was a penalty;<sup>74</sup> in others, judgment has been given for a proportional part.<sup>75</sup>

*Stipulations in Evasion of Usury Laws*

Where the sum stipulated to be paid on the breach of a contract would constitute an evasion of the usury laws, it will be treated as a penalty.<sup>76</sup> The law itself has fixed this limit of compensation in this class of cases, and therefore a stipulation for a greater sum cannot be regarded as based on the principle of compensation. It is, therefore, a penalty, if, indeed, it is not absolutely void.<sup>77</sup>

### ALTERNATIVE CONTRACTS

**61. The measure of damages for the breach of an alternative contract is compensation for the least beneficial alternative.**

An alternative contract is one which may be executed by doing either of several acts at the election of the party from whom performance is due.<sup>78</sup> The contract is completely per-

<sup>74</sup> *Town of Wheatlands v. Taylor*, 29 Hun (N. Y.) 70; *Shute v. Taylor*, 5 Metc. (Mass.) 61. See "Damages," *Dec. Dig. (Key No.)* §§ 78, 86; *Cent. Dig.* §§ 163, 182.

<sup>75</sup> *Watt's Ex'rs v. Sheppard*, 2 Ala. 425. See *Chase v. Allen*, 13 Gray (Mass.) 42. See "Damages," *Dec. Dig. (Key No.)* §§ 78, 86; *Cent. Dig.* §§ 163, 182.

<sup>76</sup> *Clark v. Kay*, 26 Ga. 403; *Brown v. Maulsby*, 17 Ind. 10; *Kurtz v. Sponable*, 6 Kan. 395; *Davis v. Freeman*, 10 Mich. 188; *State, to use of Muskingum Fund Com'rs v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Orr v. Churchill*, 1 H. Bl. 227, 232; *Gray v. Crosby*, 18 Johns. (N. Y.) 219, 226; *Foote v. Sprague*, 13 Kan. 155. But see *Lawrence v. Cowles*, 13 Ill. 577; *Gould v. Bishop Hill Colony*, 35 Ill. 324. Within the bounds of the legal rate of interest, parties may liquidate damages for nonpayment of money when due. *Hackenberry v. Shaw*, 11 Ind. 392; *Gully v. Remy*, 1 Blackf. (Ind.) 69; *Wakefield v. Beckley*, 3 McCord (S. C.) 480; *Daggett v. Pratt*, 15 Mass. 177. See *Richards v. Marshman*, 2 G. Greene (Iowa) 217. See "Usury," *Dec. Dig. (Key No.)* § 61; *Cent. Dig.* § 134.

<sup>77</sup> This would depend on the language of the statute.

<sup>78</sup> *Suth. Dam.* § 282.

formed when any one of the alternatives is performed, and so, of course, no question of damages for a breach arises. An alternative contract is not a contract for liquidated damages.<sup>79</sup> To constitute an alternative contract there must have been an intention to really give the party an option. When this is the case, the damages for a breach are limited to compensation for the least beneficial alternative, on the theory that the parties must have contemplated that the defendant would choose to perform that one.<sup>80</sup> Where, however, the contract, instead of being to do one thing or another, is an absolute engagement to do a thing, and, if not, to pay a sum of money, the damages for not doing the thing are the sum of money.<sup>81</sup> In such a case, the party has no option,<sup>82</sup> and the agreement is one for liquidated damages, subject to the rules already explained. Where the contract is to do a certain thing or to pay a given sum of money, and the defendant has failed to do the thing, he is generally held to have had his election,

<sup>79</sup> SMITH v. BERGENGREN, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768, Cooley, Cas. Damages, 149. See "Damages," Dec. Dig. (Key No.) § 82; Cent. Dig. § 178.

<sup>80</sup> Sedg. Dam. § 421.

<sup>81</sup> Deverill v. Burnell, L. R. 8 C. P. 475; Stewart v. Bedell, 79 Pa. 336; People v. Central Pac. R. Co., 76 Cal. 29, 34, 18 Pac. 90; Crane v. Peer, 43 N. J. Eq. 553, 4 Atl. 72, collecting cases. But see Hahn v. Concordia Society of Baltimore City, 42 Md. 460; City of Indianola v. Gulf, W. T. & P. Ry., 56 Tex. 594. See "Damages," Dec. Dig. (Key No.) § 82; Cent. Dig. § 178.

<sup>82</sup> Equity may enforce performance or enjoin a violation. Ayres v. Pease, 12 Wend. (N. Y.) 393; Phenix Ins. Co. v. Continental Ins. Co., 14 Abb. Prac. N. S. (N. Y.) 266; Long v. Bowring, 33 Beav. 585; Howard v. Hopkyns, 2 Atk. 371; Dike v. Greene, 4 R. I. 285; Dooley v. Watson, 1 Gray (Mass.) 414; Gray v. Crosby, 18 Johns. (N. Y.) 219; Sainter v. Ferguson, 7 C. B. 716; Hobson v. Trevor, 2 P. Wms. 191; Chilliner v. Chilliner, 2 Ves. Sr. 528; Ingledew v. Cripps, 2 Ld. Raym. 814; Sloman v. Walter, 1 Brown, Ch. 418; Lampman v. Cochran, 16 N. Y. 275; Ward v. Jewett, 4 Rob. (N. Y.) 714; Robeson v. Whitesides, 16 Serg. & R. (Pa.) 320; Robinson v. Bakewell, 25 Pa. 424; Cartwright v. Gardner, 5 Cush. (Mass.) 273; National Provincial Bank v. Marshall, 40 Ch. Div. 112. See "Damages," Dec. Dig. (Key No.) § 82; Cent. Dig. § 178.

and payment of the money may be enforced.<sup>83</sup> The form of an alternative contract cannot be used to disguise a stipulation for a penalty. If the real intent is to liquidate the damages or provide for a penalty, the intent will be enforced only so far as is compatible with the principles already explained.

<sup>83</sup> *Pearson v. Williams' Adm'rs*, 24 Wend. (N. Y.) 244; *Id.*, 26 Wend. (N. Y.) 630; *Pennsylvania R. Co. v. Reichert*, 58 Md. 261; *Hodges v. King*, 7 Metc. (Mass.) 583; *Slosson v. Beadle*, 7 Johns. (N. Y.) 72; *Allen v. Brazier*, 2 Bailey (S. C.) 293. See, also, *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, 88 Am. Dec. 396; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533 (option to pay loss or rebuild). This rule is difficult to reconcile with that of the least beneficial alternative. Its practical effect is to make an alternative contract one for liquidated damages, with this difference, that specific performance of a contract can be enforced, though it stipulates for liquidated damages, while, in alternative contracts, only the alternative chosen can be enforced. See *Crane v. Peer*, 43 N. J. Eq. 553, 558, 4 Atl. 72, and *Suth. Dam.* § 282. In *SMITH v. BERGENGREN*, 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768, *Cooley, Cas. Damages*, 149, it was held that a covenant not to practice medicine in a certain town so long as the plaintiff should remain in practice there, but containing a provision that defendant might resume practice provided he would pay plaintiff a certain sum, did not provide for either a penalty or liquidated damages. The sum named was a price fixed for what the contract permitted him to do if he paid. See "*Damages*," *Dec. Dig. (Key No.)* § 82; *Cent. Dig.* § 178.

## CHAPTER V

## INTEREST

- 62. Definition.
- 63. Interest as a Debt and as Damages.
- 64. Interest as Damages—General Rule.
- 65. Interest on Nonpecuniary Losses.
- 66. Pecuniary Losses—Liquidated Demands.
- 67. Pecuniary Losses—Unliquidated Demands.
- 68. Contracts.
- 69-70. Torts.
- 71. Condemnation Proceedings.
- 72. Defendant not Responsible for Delay.
- 73. Interest on Overdue Paper—Contract and Statute Rate.
- 74. Compound Interest.

## DEFINITION

- 62. Interest is the compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss thereof to the party entitled to its use.

There are many definitions of interest to be found in the decisions and statutes,<sup>1</sup> which, though varying in language used, correspond substantially to the definition given in the black letter text.<sup>2</sup> Thus, it is said that interest is the compen-

<sup>1</sup> Words and Phrases, p. 3706. See "Interest," *Dec. Dig. (Key No.)* § 1.

<sup>2</sup> *Suth. Dam.* § 300. "Interest is the value of the use of money; the amount of compensation for withholding money." *Sedg. Dam.* § 222; *Loudon v. Taxing Dist. of Shelby County*, 104 U. S. 771, 26 L. Ed. 923; *Minard v. Beans*, 64 Pa. 411. "Interest is the compensation that one person gives for the use and profit of another's money, or the legal damage he is obliged to pay to another person who has lost the use of his money through the payor's act or negligence, although the payor may not have received any benefit therefrom." *Perley, Interest*, p. 1. "A contract to pay interest is a contract to pay a consideration for the future use of money. The contract in this case was a contract to pay a consideration



sation allowed by law or fixed by the parties for the use or detention of money,<sup>3</sup> or that interest is in the nature of legal damages for improperly withholding a debt beyond the time when it ought to be paid.<sup>4</sup> In all definitions the ruling idea is that interest, whether regarded as a debt or as damages, is fundamentally compensation, to be allowed on considerations of right and natural justice when one cannot obtain payment of money to which he is justly entitled.<sup>5</sup>

### INTEREST AS A DEBT AND AS DAMAGES

**63. In all cases where interest is recoverable, it is given either**

- (a) By contract, in which case it is a debt; or,
- (b) By law, in which case it is given as damages.

The right to recover interest may arise out of a contract to pay it, or it may arise independently of contract. Where there is a contract for interest, such interest constitutes a debt, and is recoverable as such.<sup>6</sup> With this branch of the

for the past use of money, and therefore not a contract to pay interest in any proper or legal sense." *Daniels v. Wilson*, 21 Minn. 530. See, also, *Davis v. Yuba County*, 75 Cal. 452, 13 Pac. 874, and 17 Pac. 533. The term "usury," as originally used, was synonymous with the modern term "interest." "Usury," as now used, means only the excess of interest above the legal rate allowed. The term "interest" is broad enough to include "usury." See "*Interest*," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1.

<sup>3</sup> *People ex rel. Warfield v. Sutter St. Ry. Co.*, 129 Cal. 545, 62 Pac. 104, 79 Am. St. Rep. 137; *Borders v. Barber*, 81 Mo. 636. See "*Interest*," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1.

<sup>4</sup> *Farmers' Bank v. Reynolds*, 4 Rand. (Va.) 186; *Waller v. Kingston Coal Co.*, 191 Pa. 193, 43 Atl. 235. See "*Interest*," *Dec. Dig. (Key No.)* § 1; *Cent. Dig.* § 1.

<sup>5</sup> *Williams v. American Bank*, 4 Metc. (Mass.) 317. See "*Damages*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 135, 136; "*Interest*," *Dec. Dig. (Key No.)* § 1.

<sup>6</sup> *Hummel v. Brown*, 24 Pa. 310. See "*Damages*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 135, 136; "*Interest*," *Dec. Dig. (Key No.)* §§ 5, 9; *Cent. Dig.* §§ 11, 12, 20, 24.

subject we are not specially concerned. Where interest is given by law, it is given as damages for delay in making compensation.

### *The English Doctrine*

By the ancient common law the taking of interest was absolutely prohibited in England,<sup>7</sup> but it was subsequently permitted by statute.<sup>8</sup> It is allowed now, as a matter of right, only when there is a contract, express or implied, for its payment.<sup>9</sup> It is allowed, in the discretion of the jury, as damages, only in cases provided for by statute, and as special damages for the detention of money.

### *Same—Interest by Agreement*

Where there is an express agreement to pay interest, there is, of course, no difficulty in its allowance. It was held at an early day that, where there was an agreement to obtain money at a specific time, the law would imply an agreement to pay

<sup>7</sup> Hawk, bk. 1, c. 82; Hume, c. 33; Perley, Interest, p. 1; Suth. Dam. § 301. The habitual taking of interest was punished as a crime, and the offender's estate was forfeited to the king. *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30; *Chesterfield v. Jansen*, 1 Wils. 286-290. In *Mirror of Justice*, 191, 248, published before the Norman Conquest, it is lamented as "an abusion of the common law" that the offender was not likewise deprived of Christian burial.

<sup>8</sup> 37 Hen. VIII. c. 9 (1545). This statute limited the rate to 10 per cent., and thus negatively authorized interest. Under this statute the first lawful interest was taken in England. "Before the statute of Henry VIII., all interest on money lent was prohibited by the canon law, as it is now in Roman Catholic countries." Per Lord Mansfield in *Lowe v. Waller*, Doug. 736, 740; *President, etc., Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587, 608, per Mr. Senator Spencer, dissenting. 12 Anne, St. 2, c. 16, reduced the rate to 5 per cent. Various statutes establishing different rates had been passed between the dates of these two statutes. See note in 2 Pars. Notes & B. 391. By 17 & 18 Vict. c. 90, all the laws against usury were repealed, leaving parties at liberty to contract for any rate of interest.

<sup>9</sup> *Higgins v. Sargent*, 2 Barn. & C. 348; *Shaw v. Picton*, 4 Barn. & C. 715, 723; *Page v. Newman*, 9 Barn. & C. 378, disapproving *Arnott v. Redfern*, 3 Bing. 353.

interest after that time, if there was a default.<sup>10</sup> "Where money is made payable by an agreement between the parties, and a time given for the payment of it, this is a contract to pay the money at the given time, and to pay interest for it from the given day in case of failure of payment at that day."<sup>11</sup> But this rule has not been followed in the later cases.<sup>12</sup> An agreement to pay interest may be implied from the custom or usage of the business in which the debt is contracted.<sup>13</sup> There is an implied agreement to pay interest on mercantile securities, arising out of the custom of merchants.<sup>14</sup>

<sup>10</sup> *Blaney v. Hendricks*, 2 W. Bl. 761, 3 Wils. 205; *Shipley v. Hammond*, 5 Esp. 114; *Chalie v. Duke of York*, 6 Esp. 45.

<sup>11</sup> *Robinson v. Bland*, 2 Burrows, 1077, 1086. See, also, *Boddam v. Riley*, 2 Brown, Ch. 2; *Mountford v. Willes*, 2 Bos. & P. 337.

<sup>12</sup> See *Mayne*, Dam. § 181. The principle seems admitted by Lord Ellenborough in *Salton v. Bragg*, 15 East. 223, 226, and in *De Havilland v. Bowerbank*, 1 Camp. 50. But in *Gordon v. Swan*, 2 Camp. 429, note, 12 East, 419, he limited his language in the *De Havilland Case* to written instruments in the nature of bills or notes. In *De Bernales v. Fuller*, 2 Camp. 426, he said that, where there was no contract, express or implied, to pay interest, it could not be allowed. He reiterated the rule stated by him in the *De Havilland Case*. In *Higgins v. Sargent*, 2 Barn. & C. 348, 351, 352, *Holroyd, J.*, said: "Unless interest be payable by the consent of the parties, express, or implied from the usage of trade (as in case of bills of exchange) or other circumstances, it is not due by common law. \* \* \* Independently of these authorities I am of opinion, upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day." In *Page v. Newman*, 9 Barn. & C. 378-381, Lord Tenterden stated the rule to be that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade. Speaking of interest, it has been well said: "It would fortunately be a very difficult matter to fix upon another point of English law on which the authorities are so little in harmony with each other." *De Havilland v. Bowerbank*, 1 Camp. 50-53.

<sup>13</sup> *Eddowes v. Hopkins*, 1 Doug. 376; *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185; *Moore v. Voughton*, 1 Starkie, 487.

<sup>14</sup> *Wood's Mayne*, Dam. p. 214.

*Same—Interest as Damages*

It was early settled that, where commercial paper was not paid at maturity, interest thereafter accruing could only be recovered by way of damages unless it was provided for by the terms of the note or bill.<sup>15</sup> "Until the maturity of the bill, the interest is a debt. After its maturity, the interest is given as damages at the discretion of the jury."<sup>16</sup> This is now well established.<sup>17</sup> The allowance of interest as damages is governed in England by the statute of 3 & 4 Wm. IV. c. 42, §§ 28, 29. In all cases it is within the discretion of the jury. Independently of this statute, interest is allowed as special damages for the detention of money, but it must be specially pleaded.<sup>18</sup>

*The American Doctrine*

In America the prevailing doctrine is that the right to interest is given by the common law.<sup>19</sup> Interest is usually considered as a necessary and natural incident of money, and a

<sup>15</sup> *Du Belloit v. Lord Waterpark*, 1 Dow & R. 16; *Dent v. Dunn*, 3 Camp. 296. In *Cameron v. Smith*, 2 Barn. & Ald. 305-308, it was held that, "although by the usage of trade interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury, in order that they may find the amount." If this language applies to interest accruing before maturity, it is hard to understand the principle. In *re Burgess*, 2 Moore, 745, was a similar case, but the bill had matured and been dishonored. The interest was held to be in the nature of damages.

<sup>16</sup> *Keene v. Keene*, 3 C. B. (N. S.) 144.

<sup>17</sup> In *re Burgess*, 2 Moore, 745; *Ex parte Charman*, Wkly. Notes (1887) 184; *De Havilland v. Bowerbank*, 1 Camp. 50; *Higgins v. Sargent*, 2 Barn. & C. 348; *Page v. Newman*, 9 Barn. & C. 378. But see *Blaney v. Hendricks*, 2 W. Bl. 761; *Parker v. Hutchinson*, 3 Ves. 133; *Lowndes v. Collens*, 17 Ves. 27.

<sup>18</sup> *Watkins v. Morgan*, 6 Car. & P. 661; *Price v. Railway Co.*, 16 Mees. & W. 244; *Cameron v. Smith*, 2 Barn. & Ald. 305; *Cook v. Fowler*, L. R. 7 H. L. 27.

<sup>19</sup> Where there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. *Young v. Godbe*, 15 Wall. 563, 21 L. Ed. 250; *Young v. Polack*, 3 Cal. 208. See "*Damages*," *Dec. Dig.* (Key No.) §§ 67, 68; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig.* (Key No.) § 1; *Cent. Dig.* § 1.

person is regarded as entitled to it as a matter of right whenever the claim thereto is based on a special agreement, on an implied promise to pay it—as from a usage between the parties or usage of a particular trade—whenever money is wrongfully withheld from the owner, on an illegal conversion and use of another's property, on advances of cash.<sup>20</sup> In some states, however, it is held that the common law gives no right to interest, but merely allows the parties to contract for it, and that, unless the right to it is given by contract or by statute, it cannot be recovered.<sup>21</sup> In all the states, however, the matter of interest is largely regulated by statute.

#### *Same—Interest as a Debt*

Here, as in England, interest is always properly chargeable

<sup>20</sup> *Reid v. President, etc., of Rensselaer Glass Factory*, 3 Cow. (N. Y.) 393. See, also, *Sedg. Dam.* § 292, 6 Am. Dec. 182, and *Liotard v. Graves*, 3 Coines (N. Y.) 226. The early cases are collected and discussed in *Wood v. Robbins*, 11 Mass. 504; *Pope v. Barrett*, 1 Mason, 117, Fed. Cas. No. 11,273; *Boyd v. Gilchrist*, 15 Ala. 849; *Davis v. Greely*, 1 Cal. 422. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 68; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig. (Key No.)* § 10; *Cent. Dig.* § 21.

<sup>21</sup> *Parmelee v. Lawrence*, 48 Ill. 331; *Sammis v. Clark*, 13 Ill. 544; *Hitt v. Allen*, Id. 592; *City of Chicago v. Allcock*, 86 Ill. 384; *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537; *Hamer v. Kirkwood*, 25 Miss. 95; *Board of Sup'rs of Warren Co. v. Klein*, 51 Miss. 807; *Kenney v. Hannibal & St. J. R. Co.*, 63 Mo. 99; *Marshall v. Schrickler*, Id. 308; *Atkinson v. Atlantic & P. R. Co.*, Id. 367; *De Steiger v. Hannibal & St. J. R. Co.*, 73 Mo. 33; *Kimes v. St. Louis, I. M. & S. Ry. Co.*, 85 Mo. 611; *Randall v. Greenhood*, 3 Mont. 506; *Flannery v. Anderson*, 4 Nev. 437. In *Close v. Fields*, 2 Tex. 232, it was held that the right to interest rested wholly on statute. The statutes of many states allow interest when money is vexatiously withheld. *City of Chicago v. Allcock*, 86 Ill. 384; *Chicago & N. W. R. Co. v. Schultz*, 55 Ill. 421; *Bradley v. Geiselman*, 22 Ill. 494. Whether it was so withheld is a question for the jury. *Devine v. Edwards*, 101 Ill. 138. Merely defending a suit is not vexatious delay in payment of money. *Aldrich v. Dunham*, 16 Ill. 403. Interest runs from the time payment was due, not from the time the delay became vexatious. *City of Chicago v. Tebbetts*, 104 U. S. 120, 26 L. Ed. 655. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 68; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig. (Key No.)* §§ 5-7; *Cent. Dig.* §§ 11-19.

where there is either an express or an implied agreement to pay it; and an agreement to that effect will be implied where there was a custom to charge interest, which was known to the defendant.<sup>22</sup>

*Same—Interest as Damages*

By the earlier cases it was held that the allowance of interest as damages was discretionary with the jury.<sup>23</sup> This was especially true in actions of tort,<sup>24</sup> but the rule was also applied in actions of contract.<sup>25</sup> The court was thought to

<sup>22</sup> *Ayers v. Metcalf*, 39 Ill. 307; *Veiths v. Hagge*, 8 Iowa, 163; *McAllister v. Reab*, 4 Wend. (N. Y.) 483; *Reab v. McAllister*, 8 Wend. (N. Y.) 109; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Rayburn v. Day*, 27 Ill. 46; *Dickson v. Surginer*, 3 Brev. (S. C.) 417; *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Knox v. Jones*, 2 Dall. (Pa.) 193, 1 L. Ed. 345; *Bispham v. Pallock*, 1 McLean, 411, Fed. Cas. No. 1,442; *Koons v. Miller*, 3 Watts & S. (Pa.) 271; *Watt v. Hoch*, 25 Pa. 411; *Adams v. Palmer*, 30 Pa. 346. Under a statute providing that no more than a certain rate shall be recovered on all contracts, express or implied, for the payment of money, unless expressly stipulated for by the parties, an agreement cannot be implied to pay more than the statutory rate. *Turner v. Dawson*, 50 Ill. 85. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 68; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig. (Key No.)* §§ 5-7; *Cent. Dig.* §§ 11-19.

<sup>23</sup> *Sedg. Dam.* § 295; *McIlvaine v. Wilkins*, 12 N. H. 474; *Bailey v. Capelle*, 1 Har. (Del.) 449. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 208; *Cent. Dig.* §§ 135, 144, 145.

<sup>24</sup> It was so in trespass. *Beals v. Guernsey*, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348. And in trover. *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; *Bissell v. Hopkins*, 4 Cow. (N. Y.) 53; *Kennedy v. Strong*, 14 Johns. (N. Y.) 128; *Hallett v. Novion*, 14 Johns. (N. Y.) 273; *Novion v. Hallett*, 16 Johns. (N. Y.) 327; *Devereux v. Burgwin*, 33 N. C. 490. And in replevin. *Rowley v. Gibbs*, 14 Johns. (N. Y.) 385. And in actions for negligence. *Thomas v. Weed*, 14 Johns. (N. Y.) 255. Or for fraudulent refusal to convey land. *Handley v. Chambers*, 1 Litt. (Ky.) 358. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 208; *Cent. Dig.* §§ 135, 144, 145.

<sup>25</sup> *Dox v. Dey*, 3 Wend. (N. Y.) 356; *Gilpins v. Consequa*, Pet. C. C. 85, Fed. Cas. No. 5,452; *Watkinson v. Laughton*, 8 Johns. (N. Y.) 213; *Amory v. McGregor*, 15 Johns. (N. Y.) 24, 8 Am. Dec. 205; *Letcher v. Woodson*, 1 Brock. 212, Fed. Cas. No. 8,280; *Dotterer v. Bennett*, 5 Rich. (S. C.) 295. And, generally, it was

have the same discretion as the jury. In a leading case<sup>26</sup> it was said: "As often as the question of interest has been before a court, the judges seem to have considered it as depending on general equitable principles, and, in most cases, to have decided each case in reference to its particular circumstances, without attempting to give any rule which might be generally applicable." And in a recent case it is said that where there is no stipulation for interest, and interest is treated as damages, it will be awarded or denied according to the equity of the circumstances.<sup>27</sup> Gradually, however, and in a continually increasing number of cases, interest came to be allowed as a matter of law, and this is now the rule in many classes of cases.<sup>28</sup> Where interest is given as damages for the nonpayment or detention of money, it is an inseparable incident of the principal demand. It can only be recovered with the principal by action. It does not constitute a debt capable of a distinct claim. Whenever the principal

held that interest was discretionary with the jury. *Williams v. Consequa*, Pet. C. C. 172, Fed. Cas. No. 17,766; *Oakes v. Richardson*, 2 Lowell, 173, Fed. Cas. No. 10,390; *Crow v. State*, 23 Ark. 684; *Brady v. Wilcoxson*, 44 Cal. 239; *Rogers v. West*, 9 Ind. 400; *Morford v. Ambrose*, 3 J. J. Marsh. (Ky.) 688; *Marshall v. Dudley*, 4 J. J. Marsh. (Ky.) 244; *Bell's Adm'r v. Logan*, 7 J. J. Marsh. (Ky.) 593; *Stark's Adm'r v. Price*, 5 Dana (Ky.) 140; *Howcott v. Collins*, 23 Miss. 398; *Richmond v. Bronson*, 5 Denio (N. Y.) 55; *Hunt v. Jucks*, 2 N. C. 173, 1 Am. Dec. 555; *Hogg v. Manufacturing Co.*, 5 Ohio, 410; *Obermyer v. Nichols*, 6 Bin. (Pa.) 159, 6 Am. Dec. 439; *Heidenheimer v. Ellis*, 67 Tex. 426, 3 S. W. 666; *Close v. Fields*, 13 Tex. 623. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 208; *Cent. Dig.* §§ 135, 144, 145.

<sup>26</sup> *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587, 596.

<sup>27</sup> *Jourolman v. Ewing*, 80 Fed. 604, 26 C. C. A. 23. See, also, *Bethell v. Mellor & Rittenhouse Co.* (D. C.) 135 Fed. 445. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 68; *Cent. Dig.* §§ 135-143.

<sup>28</sup> *Lewis v. Rountree*, 79 N. C. 122, 128, 28 Am. Rep. 309; *Dana v. Fielder*, 12 N. Y. 40-50, 62 Am. Dec. 130; *Broughton v. Mitchell*, 64 Ala. 210; *Hamer v. Hathaway*, 33 Cal. 117; *Andrews v. Durant*, 18 N. Y. 496; *De Lavalette v. Wendt*, 75 N. Y. 579, 31 Am. Rep. 494; *Robinson v. Corn Exchange Insurance Co.*, 1 Abb. Prac. N. S. (N. Y.) 186; *Wehle v. Butler*, 43 How. Prac. (N. Y.) 5; *Rhemke v. Clinton*, 2 Utah, 230. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 208; *Cent. Dig.* §§ 144, 145.

*demand* is satisfied or discharged, the accrued interest, whether paid or not, is extinguished.<sup>29</sup> Interest as damages is given at the statutory rate.<sup>30</sup> Where no rate is fixed by statute, it is given at the customary rate.<sup>31</sup> Where the statutory rate is changed after interest begins to accrue, interest accrues thereafter at the new rate.<sup>32</sup> In an action on a foreign judgment, it has been held that interest should be given at the domestic rate,<sup>33</sup> whether the judgment bore in-

<sup>29</sup> *Suth. Dam.* § 300; *Dixon v. Parkes*, 1 Esp. 110; *Churcher v. Stringer*, 2 Barn. & Adol. 777; *Cutter v. Mayor*, etc., of New York, 92 N. Y. 166; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Devlin v. City of New York*, 60 Hun, 68, 14 N. Y. Supp. 251; *Hayes v. Chicago, M. & St. P. Ry. Co.*, 64 Iowa, 753, 19 N. W. 245; *Southern Cent. R. Co. v. Town of Moravia*, 61 Barb. (N. Y.) 181; *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 364; *Gillespie v. Mayor*, etc., of New York, 3 Edw. Ch. (N. Y.) 512; *Jacot v. Emmett*, 11 Paige (N. Y.) 142; *Succession of Mann*, 4 La. Ann. 28; *Succession of Anderson*, 12 La. Ann. 95; *American Bible Soc. v. Wells*, 68 Me. 572, 28 Am. Rep. 82; *Tenth Nat. Bank v. Mayor*, etc., of New York, 4 Hun (N. Y.) 429. Where interest is secured by contract, an action may be maintained for it, although the principal has been paid. *Robbins v. Cheek*, 32 Ind. 328, 2 Am. Rep. 348; *Stone v. Bennett*, 8 Mo. 41; *Fake v. Eddy's Ex'r*, 15 Wend. (N. Y.) 76; *King v. Phillips*, 95 N. C. 245, 59 Am. Rep. 238. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 68; *Cent. Dig.* §§ 135-143, 571; "*Interest*," *Dec. Dig. (Key No.)* §§ 61, 62; *Cent. Dig.* §§ 138-144.

<sup>30</sup> *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242, 44 N. W. 1096; *Brewster v. Wakefield*, 22 How. 118, 16 L. Ed. 201. See "*Damages*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 135, 136, 571; "*Interest*," *Dec. Dig. (Key No.)* § 31; *Cent. Dig.* §§ 64-67.

<sup>31</sup> *Davis v. Greely*, 1 Cal. 422; *Perry v. Taylor*, 1 Utah, 63. See "*Damages*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 135, 571.

<sup>32</sup> *White v. Lyons*, 42 Cal. 279; *Woodward v. Woodward*, 28 N. J. Eq. 119; *Wilson v. Cobb*, 31 N. J. Eq. 91; *In re Doremus' Estate*, 33 N. J. Eq. 234; *Mayor*, etc., of Jersey City v. O'Callaghan, 41 N. J. Law, 349; *Reese v. Rutherford*, 90 N. Y. 644; *Sanders v. Lake Shore & M. S. Railway Co.*, 94 N. Y. 641; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Stark v. Olney*, 3 Or. 88. See "*Damages*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 135, 571; "*Interest*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 61-63.

<sup>33</sup> *Parker v. Thompson*, 3 Pick. (Mass.) 429; *Barringer v. King*, 5 Gray (Mass.) 9; *Hopkins v. Shepard*, 129 Mass. 600; *Nelson v. Felder*, 7 Rich. Eq. (S. C.) 395. See "*Damages*," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "*Interest*," *Dec. Dig. (Key No.)* §§ 28, 38; *Cent. Dig.* §§ 55-59, 79-82.



terest by the foreign law or not. But it is sometimes held that, if the foreign rate is not proved, it will be presumed to be the same as the domestic rate.<sup>34</sup> In an action on a contract,<sup>35</sup> interest should be given at the rate of the place of performance, or of the place where the contract was made.<sup>36</sup> But it has been held that interest on overdue coupons should be given at the rate of the place where the action was brought.<sup>37</sup>

### INTEREST AS DAMAGES—GENERAL RULE

**64. Interest should be allowed as damages whenever it represents a loss proximately caused by defendant's wrong.**

It is extremely difficult to frame any rule governing the allowance of interest as damages, for the reason that the law has been in a constant state of evolution during the last 100 years, and the result reached in different jurisdictions is not yet the same. Perhaps much of the confusion in the cases has been caused by the unfortunate use of the term "interest" to indicate both interest as a debt and compensatory damages for delay, measured by the rate of interest. The contest has been whether an allowance should be made for the delay. The name by which it should be called received but little attention, and it was incautiously said that interest should or

<sup>34</sup> *Crone v. Dawson*, 19 Mo. App. 214; *Pauska v. Dans*, 31 Tex. 67; *Porter v. Munger*, 22 Vt. 191. See "Damages," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571.

<sup>35</sup> *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121, 7 Pac. 271. See "Damages," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "Interest," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 55-59.

<sup>36</sup> *Gibbs v. Fremont*, 9 Exch. 25; *Courtois v. Carpentier*, 1 Wash. C. C. 376, Fed. Cas. No. 3,286; *French v. French*, 126 Mass. 360; *Pauska v. Dans*, 31 Tex. 67; *Porter v. Munger*, 22 Vt. 191. See "Damages," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "Interest," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 55-59.

<sup>37</sup> *Fauntleroy v. Hannibal*, 5 Dill. 219, Fed. Cas. No. 4,692. See "Damages," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "Interest," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 55-59.

should not be allowed. The distinction however is important. "Interest [as a debt] is recoverable of right, but compensation for deferred payments in torts depends upon the circumstances of each case. The plaintiff may have set his damages so inordinately high as to have justified the defendant in refusing to pay; or in other ways the delay may be plaintiff's fault; or the liability of defendant may have arisen without fault, as in *Weir v. Allegheny Co.*<sup>38</sup> In such cases the jury probable would not, and certainly ought not, to make the allowance."<sup>39</sup> The failure to appreciate the true nature of interest allowed as damages for delay led to the idea, often expressed in the early cases, that interest could not be allowed unless there was a contract, express or implied, to pay it. Thus in *Dodge v. Perkins*<sup>40</sup> it was said: "If the interest is not included in the contract, it cannot be given. If it is included, then it should make up a part of the judgment." The cases are by no means unanimous in the support of any theory as to the allowance of interest as damages. The theory most consistent with the principles upon which the whole law of damages rests seems to be that interest is allowed as damages on the same principle that all damages are awarded,—that is, as compensation for losses proximately caused by defendant's wrong.

### **SAME—INTEREST ON NONPECUNIARY LOSSES**

#### **65. Interest is never recoverable in actions where the elements of injury are nonpecuniary.**

In cases where the elements of injury are nonpecuniary, interest as damages cannot be recovered. This is true in such actions as assault and battery, personal injury, libel and slander, etc. The reason for denying interest in this class of cases was clearly stated in an action for personal injury.

<sup>38</sup> 95 Pa. 413.

<sup>39</sup> *Richards v. Citizens' Natural Gas Co.*, 130 Pa. 37, 18 Atl. 600. See "Damages," *Déc. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 135, 136.

<sup>40</sup> *Pick. (Mass.)* 368, 384.

The court said: "The rule for determining damages for injuries not resulting in death, where the statute fixes the measure, and not calling for exemplary punishment, is that of compensation for mental suffering and physical pain, loss of time, and expenses incident to the injury, and, if it be permanent, the loss resulting from complete or partial disability, in health, mind, or person, thereby occasioned. \* \* \*

As this sum in gross includes all the compensation which is requisite to cover pain, suffering, and disability, to date of judgment and prospectively beyond, it is intended to be, and is, the full measure of recovery, and cannot be supplemented by the new element of damages for the detention of this sum from the date of the injury. The measure of damages being thus fixed, it is expected that, in determining it, juries and courts will make the sum given in gross a fair and just compensation, and one in the full amount proper to be given when rendered, whether soon or late after the injury; as, if given soon, it looks to continuing and suffering disability, just as, when given late, it includes that of the past. It is obvious that damages could not be given for pain and suffering and disability experienced on the very day of trial, and then interest added for years before. These are the items considered to make up the aggregate then due, and the gross sum then for the first time ascertained."<sup>41</sup> Interest, of course, cannot be allowed on exemplary damages.<sup>42</sup>

<sup>41</sup> *Louisville & N. R. Co. v. Wallace*, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548. See, also, *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *Burrows v. Lownsdale*, 133 Fed. 250, 66 C. C. A. 650; *Costello v. District of Columbia*, 21 D. C. 508. But in an action by a husband for damages for injuries to his wife, the jury may allow interest on money paid out by the husband by way of expenses. *Washington & G. R. Co. v. Hickey*, 12 App. D. C. 269. See "Damages," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

<sup>42</sup> *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684; *Dunshee v. Standard Oil Co. (Iowa)* 126 N. W. 342. See "Damages," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

**SAME—PECUNIARY LOSSES—LIQUIDATED DEMANDS**

**66. Interest is always recoverable in an action for the detention of money or the nonpayment of liquidated demands.**

Interest may be recovered in an action for the detention of money or the nonpayment of a liquidated demand, as a matter of right. Indeed, as has been seen, interest at the legal rate is the measure of damages in such cases, because the loss of such interest is the only proximate and certain result of the wrong. When a liquidated sum is due at a specific time, and is not then paid, through the debtor's fault, the American common law awards compensation in damages for the wrong. This is the money together with the value of its use, which is legal interest upon it during the time the defendant is in fault.<sup>43</sup> Interest is given as damages for the detention of the debt.<sup>44</sup> The time the money is due fixes the

<sup>43</sup>*Curtis v. Innerarity*, 6 How. 146, 12 L. Ed. 380; *Donahue v. Partridge*, 160 Mass. 336, 35 N. E. 1071; *Whitworth v. Hart*, 22 Ala. 343; *Cheek v. Waldrum*, 25 Ala. 152; *Flinn v. Barber*, 64 Ala. 193; *Broughton v. Mitchell*, Id. 210; *Caldwell v. Dunklin*, 65 Ala. 461; *Talladego Ins. Co. v. Peacock*, 67 Ala. 253; *Park v. Wiley*, Id. 310; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553; *Clark v. Dutton*, 69 Ill. 521; *Harper v. Ely*, 70 Ill. 581; *Dobbins v. Higgins*, 78 Ill. 440; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Stern v. People, to Use of St. Clair County*, 102 Ill. 540; *Hall v. Huckins*, 41 Me. 574; *Newson's Adm'r v. Douglass*, 7 Har. & J. 417, 16 Am. Dec. 317; *JUDD v. DIKE*, 30 Minn. 380, 15 N. W. 672, Cooley, Cas. Damages, 151; *Buzzell v. Snell*, 25 N. H. 474; *Stuart v. Binsse*, 10 Bosw. 436; *Gutta Percha & Rubber Manuf'g Co. v. Benedict*, 37 N. Y. Super. Ct. 430; *Spencer v. Pierce*, 5 R. I. 63; *Hauxhurst v. Hovey*, 26 Vt. 544; *Sampson v. Warner*, 48 Vt. 247; *Butler v. Kirby*, 53 Wis. 188, 10 N. W. 373; *Foote v. Blanchard*, 6 Allen, 221, 83 Am. Dec. 624. Interest is recoverable on legacies. *Custis v. Adkins*, 1 Houst. (Del.) 382, 68 Am. Dec. 422; *Hennion's Ex'rs v. Jacobus*, 27 N. J. Eq. 28; *Vermont State Baptist Convention v. Ladd*, 58 Vt. 95, 4 Atl. 634. See "Damages," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig. §§ 135-143*; "Interest," *Dec. Dig. (Key No.)* §§ 2-12; *Cent. Dig. §§ 20-24*.

<sup>44</sup>*Mounson v. Redshaw*, 1 Saund. 196-201, note; *Osbourne v.*

time of default from which interest runs. Where a sum certain is payable at a particular time, it is the debtor's duty to pay it at that time; and, if he does not, he is in default, and liable for interest.<sup>45</sup> Where money is due on demand, interest runs from the time of demand;<sup>46</sup> and the bringing of an action is a demand.<sup>47</sup> Where the defendant's own act

Hoiser, 6 Mod. 167; Bethel v. Salem Imp. Co., 93 Va. 354, 25 S. E. 304, 33 L. R. A. 602, 57 Am. St. Rep. 808; Williams v. President, etc., of Bank of Illinois, 1 Gilman (Ill.) 667; North River Meadow Co. v. Christ Church at Shrewsbury, 22 N. J. Law, 425, 53 Am. Rep. 258; Sayre v. Austin, 3 Wend. (N. Y.) 496; Sumner v. Beebe, 37 Vt. 562. See "Damages," Dec. Dig. (Key No.) §§ 67-69; Cent. Dig. §§ 135-143; "Interest," Dec. Dig. (Key No.) §§ 9-12; Cent. Dig. §§ 20-24.

"Whenever the debtor knows precisely what he is to pay, and when he is to pay, he shall be charged with interest if he neglects to pay." People v. County of New York, 5 Cow. (N. Y.) 331. "Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for the failure to keep a contract, interest attaches as an incident." State v. Lott, 69 Ala. 147, 155. Where a contract provides for liquidated damages, interest is recoverable on the stipulated amount from the date of the breach. Mead v. Wheeler, 13 N. H. 351; Little v. Banks, 85 N. Y. 258; Winch v. Mutual Ben. Ice Co., 96 N. Y. 618. But see Yellow Pine Lumber Co. v. Carroll, 76 Tex. 135, 13 S. W. 261. Interest is recoverable on the amount due on an insurance policy. Field v. Insurance Co. of North America, 6 Biss. 121, Fed. Cas. No. 4,767; Swanscot Mach. Co. v. Partridge, 25 N. H. 369, 380. Cf. Higgins v. Sargent, 2 Barn. & C. 348. Interest is recoverable on a note, after maturity, though it did not bear interest by its terms. Gibbs v. Fremont, 9 Exch. 25; Kitchen v. Branch Bank at Mobile, 14 Ala. 233; Swett v. Hooper, 62 Me. 54. Where a note reserves usurious interest, which is forfeited by statute, legal interest is recoverable after maturity. Fisher v. Bidwell, 27 Conn. 363. See "Damages," Dec. Dig. (Key No.) §§ 67-69; Cent. Dig. §§ 135-143, 571, 572; "Interest," Dec. Dig. (Key No.) § 13; Cent. Dig. § 25.

"Ragland v. Wood, 71 Ala. 145, 46 Am. Rep. 305; Gleason v. Briggs, 28 Vt. 135; Brem v. Covington, 104 N. C. 589, 10 S. E. 706; Irlbocker v. Roth, 25 App. Div. 290, 49 N. Y. Supp. 538. See "Damages," Dec. Dig. (Key No.) § 226; Cent. Dig. §§ 571, 572.

"Brion v. Kennedy, 47 Mich. 499, 11 N. W. 288; Morse v. Rice, 36 Neb. 212, 54 N. W. 308; Kaufman v. Treadway, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190; Mulligan v. Smith, 32 Colo. 404, 76

makes a demand useless or impossible, interest may be recovered from the date of such act.<sup>48</sup>

It is a general rule that, in the absence of a statute specially permitting it, interest is not allowed on claims against the United States, whether they originate in contract or in tort.<sup>49</sup> So, too, a state is not usually liable for interest.<sup>50</sup> A municipal corporation need not seek its creditors, and, therefore, is not in default until payment is demanded, and no interest can be recovered until that time.<sup>51</sup> Interest is not recoverable

Pac. 1063; *Dempsey v. Schawacker*, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100. See "*Damages*," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* §§ 571, 572.

\**Nisbet v. Lawson*, 1 Ga. 275; *Chemical Nat. Bank v. Bailey*, Fed. Cas. No. 2,635, 12 Blatchf. 480; *Perine v. Grand Lodge A. O. U. W.*, 51 Minn. 224, 53 N. W. 367. See "*Damages*," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* §§ 571, 572.

\**United States ex rel. Angarica De La Rua v. Bayard*, 127 U. S. 251, 8 Sup. Ct. 1156, 32 L. Ed. 159; *United States v. Verdier*, 164 U. S. 213, 17 Sup. Ct. 42, 41 L. Ed. 407; *Walton v. United States (C. C.)* 61 Fed. 486. See "*United States*," *Dec. Dig. (Key No.)* § 110; *Cent. Dig.* § 93.

\**Whitney v. State*, 52 Miss. 732. Compare *Lakeside Paper Co. v. State*, 45 App. Div. 112, 60 N. Y. Supp. 1081. See "*States*," *Dec. Dig. (Key No.)* § 171; *Cent. Dig.* § 162.

\**Paul v. Mayor, etc.*, of New York, 7 Daly (N. Y.) 144; *Yellowby v. Pitt County Com'rs*, 73 N. C. 164. In *Wheeler v. County of Newberry*, 18 S. C. 132, and *Ashe v. County of Harris*, 55 Tex. 49, it was held that municipal corporations were not liable for interest at all, in the absence of contract or statute. The same result was reached in Illinois and Mississippi by interpretation of the statutes. *City of Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244; *City of Chicago v. People ex rel. Norton*, 56 Ill. 327; *Board of Sup'rs of Warren Co. v. Klein*, 51 Miss. 807; *Board of Sup'rs of Clay Co. v. Board of Sup'rs of Chickasaw Co.*, 64 Miss. 534, 1 South. 753. And in Pennsylvania it is held that debts are not payable until there are funds on hand, as debts are payable only out of taxes. *Allison v. Juniata County*, 50 Pa. 351. In some jurisdictions interest is allowed on claims against municipal corporations after demand. *Robbins v. Lincoln County Court*, 3 Mo. 57; *Risley v. Andrew County*, 46 Mo. 382; *Paul v. Mayor, etc.*, of New York, 7 Daly (N. Y.) 144; *Yellowby v. Commissioners of Pitt Co.*, 73 N. C. 164. And see *Jacks v. Turner*, 36 Ark. 89. See "*Municipal Corporations*," *Dec. Dig. (Key No.)* § 1002; *Cent. Dig.* § 2174.

on fines and penalties,<sup>52</sup> or, in the absence of statute, on delinquent taxes.<sup>53</sup>

It is usually held that interest is recoverable in an action of debt on a judgment, regardless of whether the original demand carried interest or not.<sup>54</sup>

<sup>52</sup> *State v. Steen*, 14 Tex. 396; *Higley v. First Nat. Bank of Beverly*, 26 Ohio St. 75, 20 Am. Rep. 759. A statute allowing the highest market value of property destroyed between the time of destruction and the trial provides for a penalty, and interest is not recoverable. *Smith v. Morgan*, 73 Wis. 375, 41 N. W. 532; *Central Railroad & Banking Co. v. Atlantic & G. R. Co.*, 50 Ga. 444; *Ware v. Simmons*, 55 Ga. 94. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

<sup>53</sup> *Perry County v. Selma, M. & M. R. Co.*, 65 Ala. 391; *Perry v. Washburn*, 20 Cal. 318, 350; *Danforth v. Williams*, 9 Mass. 321. Where one wrongfully enjoins the collection of taxes from himself, he is liable for interest. *Rosenberg v. Weekes*, 67 Tex. 578, 4 S. W. 899. It has been held that interest is not recoverable on the quota of taxes due from a county to the state. *State v. Multnomah County*, 13 Or. 287, 10 Pac. 635. Contra, *State ex rel. Sheridan v. Van Winkle*, 43 N. J. Law, 125. Interest is recoverable on special taxes assessed against abutting owners for street improvements. *Gest v. City of Cincinnati*, 26 Ohio St. 275. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143; "*Taxation*," *Dec. Dig. (Key No.)* § 528; *Cent. Dig.* § 981.

<sup>54</sup> *Klock v. Robinson*, 23 Wend. (N. Y.) 157. It is held in some states to be recoverable by common law. *Perkins v. Fourniquet*, 14 How. 328, 331, 14 L. Ed. 441; *Crawford v. Simonton's Ex'rs*, 7 Port (Ala.) 110; *Gwinn v. Whitaker's Adm'x*, 1 Har. & J. 754; *Hodgdon v. Hodgdon*, 2 N. H. 169; *Mahurin v. Bickford*, 6 N. H. 567; *Harrington v. Glenn*, 1 Hill (S. C.) 79; *Nelson v. Felder*, 7 Rich. Eq. (S. C.) 395; *Beall v. Silver*, 2 Rand. (Va.) 401; *Mercer's Adm'r v. Beale*, 4 Leigh (Va.) 189; *Booth v. Ableman*, 20 Wis. 602. It is recoverable by statute. *Dougherty v. Miller*, 38 Cal. 548; *Brigham v. Vanbuskirk*, 6 B. Mon. (Ky.) 197; *Todd v. Botchford*, 86 N. Y. 517; *Coles v. Kelsey*, 13 Tex. 75; *Hagood v. Aikin*, 57 Tex. 511. It was held not recoverable, without statute, in *Reece v. Knott*, 3 Utah, 451, 24 Pac. 757. See, also, *Guthrie v. Wickliffs*, 4 Bibb (Ky.) 541, 7 Am. Dec. 746; *Cogswell's Heirs v. Lyon*, 3 J. J. Marsh. 38. A levy on a judgment or a scire facias cannot include interest, in the absence of statute. *Perkins v. Fourniquet*, 14 How. 328, 331, 14 L. Ed. 441; *Solen v. Virginia & T. R. Co.*, 14 Nev. 405; *Barron v. Morrison*, 44 N. H. 226; *Watson v. Fuller*, 6 Johns. (N. Y.) 283; *Mann's Ex'rs v. Taylor*, 1 Mc-

*Money Wrongfully Acquired or Used*

Where one acquires money to which he has no right, it is his duty to pay it over immediately; and, if he fails to do so, he is chargeable with interest.<sup>65</sup> Where one lawfully acquires money belonging to another, but improperly converts it to his own use, or withholds it after it is his duty to pay it over, he is liable for interest from the time of its conversion or detention.

Cord, 171; *Williamson v. Broughton*, 4 McCord (S. C.) 212; *Hall v. Hall*, 8 Vt. 156.

**BETWEEN VERDICT AND JUDGMENT.** Interest between verdict and judgment is regulated by statute in almost all jurisdictions. Various rules prevail. See *Hallum v. Dickinson*, 47 Ark. 120, 14 S. W. 477; *Baltimore City Pass. Ry. Co. v. Sewell*, 37 Md. 443; *Lord v. Mayor, etc., of City of New York*, 3 Hill, 426; *Henning v. Van Tyne*, 19 Wend. 101; *Kelsey v. Murphy*, 30 Pa. 340; *Norris v. City of Philadelphia*, 70 Pa. 332; *Dowell v. Griswold*, 5 Sawy. 23, Fed. Cas. No. 4,040; *Swails v. Cissna*, 61 Iowa, 693, 17 N. W. 39; *Irvin v. Hazleton*, 37 Pa. 465; *Gibson v. Cincinnati Enquirer*, 2 Flip. 88, Fed. Cas. No. 5,391; *Com. v. Boston & M. R. Co.*, 3 Cush. 25; *Johnson v. Atlantic & St. L. R. Co.*, 43 N. H. 410; *McLimans v. City of Lancaster*, 65 Wis. 240, 26 N. W. 566; *McKim v. Blake*, 139 Mass. 593, 2 N. E. 157.

**ON APPEAL.** Interest is often allowed as damages for a frivolous or vexatious appeal. Its allowance is regulated by statute. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig. (Key No.)* § 22; *Cent. Dig.* §§ 43-53.

<sup>65</sup>Interest is recoverable on money obtained by false representations. *Arthur v. Wheeler & Wilson Manuf'g Co.*, 12 Mo. App. 335. See, also, *Snow v. Nowlin*, 43 Mich. 383, 5 N. W. 443; *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40; *Nichols v. Coleman*, 96 App. Div. 363, 89 N. Y. Supp. 234. In *Rutheford v. Irby*, 1 Ga. App. 499, 57 S. E. 927, it was held that in an action to recover the value of property, which plaintiff was induced to part with because of certain deceitful statements made to him by defendant, the damages were liquidated, and interest was properly allowed. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 23.



**SAME—PECUNIARY LOSSES—UNLIQUIDATED DEMANDS**

67. In actions where the injury is wholly pecuniary, interest is recoverable as of right, though the loss is unliquidated.

**EXCEPTION**—In many jurisdictions, where the loss is unliquidated, interest is discretionary with the jury.

In all cases, either of tort or contract, where the loss is wholly pecuniary, and may be fixed as of a definite time, interest should be allowed as a matter of right, whether the loss is liquidated or unliquidated. Into these cases the element of time enters as an important factor, and the plaintiff will not be fully compensated unless he receive, not only the value of what he has lost, but receive it as nearly as may be as of the date of his loss.<sup>56</sup> Hence, additional damages in the nature of interest for the lapse of time should be allowed. It is never interest as such, but compensation, for the delay of which the rate of interest affords the fair legal measure.<sup>57</sup>

It has been seen that interest is universally allowed in actions for the nonpayment of liquidated demands.<sup>58</sup> In the case of unliquidated demands there is apparently great confusion and uncertainty; but this uncertainty is, perhaps, more apparent than real. It would seem to arise from the somewhat broad statements of writers on the subject, and the failure of the courts to distinguish between those cases in which the

<sup>56</sup> *Sullivan v. McMillan*, 37 Fla. 134, 19 South. 340, 53 Am. St. Rep. 239; *Hardy v. Boston & M. R. R.*, 68 N. H. 524, 41 Atl. 179; *J. I. Case Plow Works v. Niles & Scott Co.*, 107 Wis. 9, 82 N. W. 568. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

<sup>57</sup> *Richards v. Citizens' Natural Gas Co.*, 130 Pa. 37, 18 Atl. 600; *Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495; *State v. Lott*, 69 Ala. 147; *J. I. Case Plow Works v. Niles & Scott Co.*, 107 Wis. 9, 82 N. W. 568. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

<sup>58</sup> See ante, p. 235.

damages are not only unliquidated, but also wholly uncertain and speculative, and consequently incapable of being liquidated, and those cases in which the damages, though unliquidated, are capable of being made certain as to both time and amount. In many instances the rule has been broadly stated that interest is not recoverable when the demand is unliquidated. But it is believed that in most instances the implied or express qualifications of the statement have been overlooked. Thus, a much-quoted writer has made the general statement: "It is a general principle that interest is not allowed on unliquidated damages or demands. \* \* \* Interest is denied when the demand is unliquidated, for the reason that the person liable does not know what sum he owed, and therefore cannot be in default for not paying."<sup>59</sup> But these statements are qualified by limiting the application of the term "unliquidated" to the damages which arise in such torts as assault and battery, slander, and the like, and in contract to claims arising on quantum meruit, damages which "are wholly at large, depending on no legal standard," and which can be made certain only by accord or by verdict.

It cannot be doubted that the ancient rule was adverse to the allowance of interest on unliquidated demands. But more liberal ideas prevail in modern, and especially American, authorities, and in the allowance of interest the distinction between liquidated and unliquidated demands is practically obliterated.<sup>60</sup> A leading writer on the subject says: "The determination of the question whether interest can or cannot be allowed is by no means free from difficulty. The most general classification of causes of action with reference to interest is into liquidated and unliquidated demands. And it was formerly attempted to lay down the rule that interest could be recovered only on liquidated demands. But it will be perceived that, not only is the distinction itself not by any means easy to keep in view, but, besides this, there is no reason, in

<sup>59</sup> *Suth. Dam.* § 347.

<sup>60</sup> *Sullivan v. McMillan*, 37 Fla. 134, 19 South. 340, 53 Am. St. Rep. 239. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* § 35-40.

the nature of things, why the fact of a demand being unliquidated should debar the plaintiff from receiving or exempt the defendant from paying interest. And, finally, we do not find as a matter of fact that the line between cases in which interest is allowed and cases in which it is refused corresponds with the line between liquidated and unliquidated demands. \* \* \* The objection to this classification lies, not only in its difficulty of application, which might perhaps be surmounted, but in the fact of its unfairness. There is no reason why a person injured should have a smaller measure of recovery in one case than the other. \* \* \* On general principles, once admit that interest is the natural fruit of money, it would seem that, wherever a verdict liquidates a claim, and fixes it as of a prior date, interest should follow from that date. \* \* \* There are two tests which are constantly applied by the courts, having been found by them more useful than the attempted division into liquidated and unliquidated demands. Of these the first is whether the demand is of such a nature that its exact pecuniary amount was either ascertained or ascertainable by simple computation, or by reference to generally recognized standards, such as market price; second, whether the time from which interest, if allowed, must run—that is, a time of definite default or tortfeasance—can be ascertained.”<sup>61</sup>

Another source of confusion and uncertainty is found in the somewhat prevalent idea that the allowance of interest as damages proceeds on the theory that defendant is in default for not paying without delay. It may be conceded that, where defendant is not responsible for the delay, he cannot justly be charged with interest. But if one causes a loss which is in its nature unliquidated, and which must therefore be submitted to a jury, he is clearly liable for the necessary delay.<sup>62</sup> The damages caused by such delay are clearly a proximate result of the original wrong. These damages are measured by the rate of interest, and the wrongdoer is clearly liable on principle.

<sup>61</sup> 1 Sedg. Dam. (8th Ed.) §§ 299, 300.

<sup>62</sup> *Hardy v. Boston & M. R. R.*, 68 N. H. 524, 41 Atl. 179. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

Interest, as damages, is given as compensation for loss suffered by the detention of money, and the loss suffered is equally great, whether the demand is liquidated or unliquidated.<sup>63</sup>

It would seem too clear for argument that, where interest is a necessary part of complete or even approximate indemnity, the injured person should be entitled to it as a matter of law, and it should not be left to the discretion of a jury. The measure of damages is in all cases a matter of law, though, where the injury is nonpecuniary, the jury necessarily determines the amount. The decisions are far from harmonious, however, in this class of cases. In many jurisdictions the allowance of interest is still held to be within the discretion of the jury. In some jurisdictions it may depend upon the form of action. Thus, in Massachusetts, if the action is trover, interest is recoverable as a matter of law; whereas, if the action is case for negligently destroying property, interest is discretionary with the jury.<sup>64</sup> The New York court said, in an action of non-delivery of goods sold: "Interest is a necessary item in the estimate of damages in this class of cases. The party is entitled, on the day of performance, to the property agreed to be delivered. If it is not delivered, the law gives, as the measure of compensation then due, the difference between the contract and market prices. If he is not also entitled to interest from that time, as a matter of law, this contradictory result follows: that, while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount that, the longer a party is delayed in obtaining it, the greater shall its inadequacy become. It is, however, conceded to be law that, in these cases, the jury may give interest, by way of damages, in their discretion. Now, in all cases, unless this be an exception, the measure of damages, in an action upon a contract relating to money or property, is a question of law, and does not at all rest in the discretion of the jury."<sup>65</sup>

<sup>63</sup> *Frazer v. Bigelow Carpet Co.*, 141 Mass. 127, 4 N. E. 620. See "Damages," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

<sup>64</sup> *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620. See "Damages," *Dec. Dig. (Key No.)* §§ 67-69, 208; *Cent. Dig.* §§ 135-145.

<sup>65</sup> *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130. See "Damages," *Dec. Dig. (Key No.)* §§ 65-67; *Cent. Dig.* §§ 135-145.

The principles set forth in the foregoing paragraphs ought, it is believed, to govern the allowance of damages in all cases. Possibly it cannot yet be said that they are the law. The supreme court of Wisconsin, after a careful consideration of the question in *Laycock v. Parker*<sup>66</sup> and in *J. I. Case Plow Works v. Niles & Scott Co.*,<sup>67</sup> regards it as well established by the preponderance of authority that there are cases for breach of contract, and cases sounding in tort, where the damages are wholly unliquidated, but may be fixed by known and reasonably certain market values or other definite standards, where interest is to be allowed from the time of the breach or the commission of the injury. In such cases interest is not allowed as such, but simply as compensation for the delay and in order that the plaintiff may be fully remunerated for the injury. By the term "market value" it must not be understood that reference is made necessarily to definite quotations on a board of trade or to such a degree of certainty that no difference of opinion could exist. If one, having a certain commodity to purchase or services to hire, can by inquiry among those familiar with the subject learn approximately the current prices which he would have to pay therefor, a market value can well be said to exist, so that no serious inequity will result from the application of the foregoing rule to those who desire to act justly.<sup>68</sup>

An examination of the decisions, especially recent ones, in the light of the foregoing principles, discloses that the rules set forth above are more generally followed than would seem to be the case.

<sup>66</sup> *LAYCOCK v. PARKER*, 103 Wis. 161, 79 N. W. 327, Cooley, Cas. Damages, 152, where will be found an excellent historical survey and discussion of the question by Judge Dodge.

<sup>67</sup> 107 Wis. 9, 82 N. W. 568.

<sup>68</sup> *LAYCOCK v. PARKER*, 103 Wis. 161, 79 N. W. 327, Cooley, Cas. Damages, 152.

**68. CONTRACTS**—In actions *ex contractu*, where the damages are unliquidated, interest is usually recoverable, as a matter of law:

- (a) From the time of the breach, where the damages can be made certain by simple computation, or by reference to recognized standards such as market value.
- (b) From the time of demanding an accounting, where the demand is reasonable, and therefore puts defendant in default for not paying the amount which would have been found due.
- (c) From the commencement of the action.

One cannot pay or make tender until both the time and the amount due have been ascertained. As to time, in actions either for breach of contract or tort, compensation is due as soon as the amount is or should be ascertained, and therefore defendant cannot be charged with interest before that time. In actions for breach of contract, the allowance of interest is a question of law for the court.<sup>69</sup>

*Damages Made Certain by Computation or Reference to Recognized Standards*

The old common-law rule, which required that a demand should be liquidated, or its amount in some way ascertained, before interest could be allowed, has been generally modified so far as to hold that, if the amount is capable of being ascertained by mere computation, then it shall carry interest.<sup>70</sup> "Id certum est, quod reddere certum potest." So, where the amount can be ascertained by computation, together with a reference to well-established market values, interest is re-

<sup>69</sup> *Mansfield v. New York Cent. & H. R. R. Co.*, 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566. See "Damages," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 144, 145.

<sup>70</sup> *McMahon v. New York & E. R. Co.*, 20 N. Y. 463; *Sullivan v. McMillan*, 37 Fla. 134, 19 South. 340, 53 Am. St. Rep. 239. See "Damages," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-145; "Interest," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 35-40.

coverable from the date of the breach; for such values are so nearly certain that the debtor can obtain some proximate knowledge of how much he has to pay.<sup>71</sup>

On the other hand, where the amount of the damages cannot be readily ascertained by computation or reference to recognized standards, but are wholly uncertain or speculative, they are in every sense unliquidated, and interest will not be allowed.<sup>72</sup> Thus, where the demand was for an

<sup>71</sup> *Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495; *Brown v. Doyle*, 69 Minn. 543, 73 N. W. 814; *Southern Pac. Co. v. Arnett*, 126 Fed. 75, 61 C. C. A. 131; *Reynolds v. Barr*, 108 App. Div. 31, 93 N. Y. Supp. 319; *J. I. Case Plow Works v. Niles & Scott Co.*, 107 Wis. 9, 82 N. W. 568; *Van Rensselaer v. Jewett*, 2 N. Y. 135, 51 Am. Dec. 275; *McMahon v. New York & E. R. Co.*, 20 N. Y. 463; *Mansfield v. New York Cent. & H. R. R. Co.*, 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; *Murray v. Doud*, 167 Ill. 368, 47 N. E. 717, 59 Am. St. Rep. 297, affirming 63 Ill. App. 247; *McCreeny v. Green*, 38 Mich. 172; *Sipperly v. Stewart*, 50 Barb. (N. Y.) 62; *Smith v. Velie*, 60 N. Y. 106. In an action for breach of a contract to deliver property at a certain time, interest is recoverable on the value of the property from that time. *Pujol v. McKinlay*, 42 Cal. 559; *Bickell v. Colton*, 41 Miss. 368; *Bicknall v. Waterman*, 5 R. I. 43; *Merryman v. Criddle*, 4 Munf. (Va.) 542; *Enders v. Board of Public Works*, 1 Grat. (Va.) 364, 390; *Van Rensselaer's Ex'rs v. Jewett*, 5 Denio (N. Y.) 135; *Id.*, 2 N. Y. 135, 51 Am. Dec. 275; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643; *Livingston v. Miller*, 11 N. Y. 80; *McKenney v. Haines*, 63 Me. 74; *Savannah & C. R. Co. v. Callahan*, 56 Ga. 331; *Inhabitants of Canton v. Smith*, 65 Me. 203-209. *Contra*, *Dobenspeck v. Armel*, 11 Ind. 31. In *Stark's Adm'r v. Price*, 5 Dana (Ky.) 140, it was held to be discretionary with the jury. Where the goods have not been paid for, interest is recoverable on the difference between the contract and the market price. *Dana v. Fielder*, 12 N. Y. 40, 62 Am. Dec. 130; *Cease v. Cockle*, 76 Ill. 484; *Driggers v. Bell*, 94 Ill. 223; *Thomas v. Wells*, 140 Mass. 517, 5 N. E. 485; *Clark v. Dales*, 20 Barb. (N. Y.) 42; *Hamilton v. Ganyard*, 34 Barb. (N. Y.) 204; *Fishell v. Winans*, 38 Barb. (N. Y.) 228; *Currie v. White*, 6 Abb. Prac. N. S. (N. Y.) 352. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 35-40.

<sup>72</sup> *Mansfield v. New York Cent. & H. R. Co.*, 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417; *Dady v. Condit*, 209 Ill. 488, 70 N. E. 1088; *Harvey v. Hamilton*, 155 Ill. 377, 40 N. E. 592; *Gray v. Central R. Co. of*

amount claimed to be due for extra work, it was held that interest was not recoverable, as the amount due was largely a matter of opinion.<sup>73</sup> So, where the claim for damages rests wholly or almost entirely on loss of profits, interest will not be allowed.<sup>74</sup>

*Demand for Accounting—Commencement of Suit*

Where the plaintiff has made a reasonable demand for an accounting, and defendant fails to accede to it, or to pay the amount which would have been found due, he is in default from the date of demand, and chargeable with interest.<sup>75</sup> A demand for a sum assumed to be due may be considered a sufficient demand for a settlement, if the sum is a reasonable one.<sup>76</sup> The cases are not harmonious. Some hold that in-

New Jersey, 157 N. Y. 483, 52 N. E. 555; *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752, affirming 12 App. Div. 481, 42 N. Y. Supp. 38; *Wittenberg v. Mollyneaux*, 59 Neb. 203, 80 N. W. 824; *Anthony v. Moore & Manger Co.*, 135 App. Div. 203, 120 N. Y. Supp. 402; *Bleakley v. Sheridan*, 115 App. Div. 657, 100 N. Y. Supp. 1029; *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.*, 180 N. Y. 280, 73 N. E. 48; *Bagley v. Stern*, 92 N. Y. Supp. 244. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

<sup>73</sup> *Devine v. Keowin*, 52 Misc. Rep. 535, 102 N. Y. Supp. 841. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 35-40.

<sup>74</sup> *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417; *Beckwith v. City of New York*, 121 App. Div. 462, 106 N. Y. Supp. 175; *McGuire v. Galligan*, 53 Mich. 453, 19 N. W. 142; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 128 Mo. 224, 27 S. W. 568, 30 S. W. 430. And compare *Tilghman v. Proctor*, 125 U. S. 161, 8 Sup. Ct. 894, 31 L. Ed. 664, where the claim was for infringement of a patent. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

<sup>75</sup> *Gray v. Van Amringe*, 2 Watts & S. (Pa.) 128. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69, 226; *Cent. Dig.* §§ 135-143, 572; "*Interest*," *Dec. Dig. (Key No.)* § 46; *Cent. Dig.* §§ 95-105.

<sup>76</sup> *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 90; *Hand v. Church*, 39 Hun (N. Y.) 303. Contra, *People v. Supervisors of Delaware*, 9 Abb. Prac. N. S. (N. Y.) 408. A demand for an unreasonably large sum will not put defendant in default. *Goff v. Inhabitants of Rehoboth*, 2 Cush. (Mass.) 475; *Shipman v. State*, 44 Wis. 458. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69, 226; *Cent. Dig.* §§ 135-143, 572.



terest is recoverable from the beginning of the suit.<sup>77</sup> This may be sustained on principle, if the bringing of suit is considered a demand;<sup>78</sup> but it is hard to see why the bringing of a suit should set interest running, if a demand will not.<sup>79</sup> Other cases hold that interest is recoverable only after verdict, for the amount is not liquidated until then.<sup>80</sup> Where defendant reduces plaintiff's recovery by a recoupment, the demands on both sides are unliquidated, and interest on the balance is usually allowed only from verdict.<sup>81</sup> If it was defendant's duty to liquidate the debt, and he fails to do so, he

<sup>77</sup> *Goddard v. Foster*, 17 Wall, 123, 21 L. Ed. 589; *Mercer v. Vose*, 67 N. Y. 56; *Hand v. Church*, 39 Hun (N. Y.) 303; *Gammon v. Abrams*, 53 Wis. 323, 10 N. W. 479; *Tucker v. Grover*, 60 Wis. 240, 19 N. W. 62; *McCollum v. Seward*, 62 N. Y. 316; *Feeter v. Heath*, 11 Wend. (N. Y.) 478; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Hewitt v. John Week Lumber Co.*, 77 Wis. 548, 46 N. W. 822. "Where interest is refused in actions of contract, on the ground that the claim is unliquidated, it is in fact usually allowed from the date of the writ." *Sedg. Dam.* § 315. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143, 572.

<sup>78</sup> *LAYCOCK v. PARKER*, 103 Wis. 116, 79 N. W. 327, *Cooley, Cas. Damages*, 152. See "*Damages*," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 572; "*Interest*," *Dec. Dig. (Key No.)* § 47; *Cent. Dig.* §§ 106-112.

<sup>79</sup> *White v. Miller*, 78 N. Y. 393; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417; *LAYCOCK v. PARKER*, 103 Wis. 116, 79 N. W. 327, *Cooley, Cas. Damages*, 152. See "*Damages*," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 572; "*Interest*," *Dec. Dig. (Key No.)* § 47; *Cent. Dig.* §§ 106-112.

<sup>80</sup> *Cox v. McLoughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; *Murray v. Ware's Adm'r*, 1 Bibb (Ky.) 325, 4 Am. Dec. 637; *McKnight v. Dunlop*, 4 Barb. (N. Y.) 36; *Pursell v. Fry*, 19 Hun (N. Y.) 595; *Day v. New York Cent. R. Co.*, 22 Hun (N. Y.) 412; *Martin v. State*, 51 Wis. 407, 8 N. W. 248. See "*Interest*," *Dec. Dig. (Key No.)* §§ 44, 47; *Cent. Dig.* §§ 93, 106-112.

<sup>81</sup> *The Isaac Newton*, 1 Abb. Adm. 588, *Fed. Cas. No.* 7,090; *Brady v. Wilcoxson*, 44 Cal. 239; *Still v. Hall*, 20 Wend. 51; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417. In *Palmer v. Stockwell*, 9 Gray (Mass.) 237, interest was allowed on the balance recovered from the date of the writ. See "*Interest*," *Dec. Dig. (Key No.)* § 19; *Cent. Dig.* §§ 35-40.

is clearly in default, and chargeable with interest.<sup>82</sup> But, ordinarily, when plaintiff makes no demand for payment or accounting, interest is not recoverable, for defendant is not in default.<sup>83</sup>

**69. TORTS**—In actions *ex delicto*, interest is recoverable in proper cases, sometimes as a matter of legal right, and sometimes in the discretion of the jury.

**70.** In determining when interest is recoverable, the following rules may be stated:

- (a) Interest is never recoverable on discretionary damages.
- (b) Where there is a pecuniary loss, but not such as to deprive one of title to any specific thing, the jury may usually add interest, in their discretion, to make the compensation adequate.
- (c) Where there is a pecuniary loss, of such a nature as to deprive one of title to a specific thing, or which is so regarded, interest is recoverable on the value of the property, as a matter of legal right.

<sup>82</sup> *Moore v. Patton*, 2 Port (Ala.) 451; *McMahon v. New York & E. R. Co.*, 20 N. Y. 463; *Donahue v. Partridge*, 160 Mass. 336, 35 N. E. 1071; *Ansley v. Peters*, 1 Allen (N. B.) 339; *Robinson v. Stewart*, 10 N. Y. 189, 197. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143; "*Interest*," *Dec. Dig. (Key No.)* § 46; *Cent. Dig.* §§ 95-105.

<sup>83</sup> *Adams Exp. Co. v. Milton*, 11 Bush (Ky.) 49; *Gallup v. Perue*, 10 Hun (N. Y.) 525; *People v. Supervisors of Delaware*, 9 Abb. Prac. N. S. (N. Y.) 408; *Marsh v. Fraser*, 37 Wis. 149; *Newell v. Keith*, 11 Vt. 214. See, also, *Journalmon v. Ewing*, 80 Fed. 604, 26 C. C. A. 23, and *Culmer v. Caine*, 22 Utah, 216, 61 Pac. 1008, as to result of laches of plaintiff. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 135-143.

*Interest on Discretionary Damages*

Where the damages caused by a tort are not only unascertained, but unascertainable, save by the enlightened conscience of a jury, as in cases of personal injury, interest cannot be recovered.<sup>84</sup> Nor can interest be allowed in cases where exemplary damages may be recovered.<sup>85</sup> Sums ascertainable only by the enlightened conscience of a jury do not bear interest before verdict, either as interest or as damages, within the discretion of the jury or without. Cases of this nature always involve nonpecuniary elements of injury, and have already been sufficiently explained.<sup>86</sup> The jury have such discretion only when actual pecuniary damage is involved.

The rule already referred to as to the recovery of interest when the damages, though unliquidated, are nevertheless easily ascertainable, applies in cases of tort as well as cases of contract, and the modern doctrine seems to be that in cases sounding in tort, when the damages are easily computed and ascertained, interest will be allowed from the date of the injury.<sup>87</sup> The true test to be applied as to whether interest shall be allowed before judgment in a given case is not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of

<sup>84</sup> *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; *Louisville & N. R. Co. v. Wallace*, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548; *Pittsburgh, S. Ry. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *Burrows v. Lownsdale*, 133 Fed. 250, 66 C. C. A. 650; *Costello v. District of Columbia*, 21 D. C. 508. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145.

<sup>85</sup> *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684; *Deinshee v. Standard Oil Co. (Iowa)* 126 N. W. 342. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145.

<sup>86</sup> See ante, p. 223.

<sup>87</sup> *FELL v. UNION PAC. RY. CO.*, 32 Utah, 101, 88 Pac. 1003, 28 L. R. A. (N. S.) 1, *Cooley, Cas. Damages*, 159; *New York, N. H. & H. R. Co. v. Ansonia Land & Water Power Co.*, 72 Conn. 703, 46 Atl. 157. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* § 137-145.

value, which the court or jury must follow in fixing the amount, rather than be guided by their judgment in assessing the amount to be allowed for past as well as future injury, or for elements that cannot be measured by any fixed standards of value.<sup>88</sup>

*Property Losses in General*

Where a tort causes a property loss, but is not such as to deprive the owner of title to any specific thing, as where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury.<sup>89</sup> Only specific damages, computable on direct

<sup>88</sup> *FELL v. UNION PAC. RY. CO.*, 32 Utah, 101, 88 Pac. 1003, 28 L. R. A. (N. S.) 1, Cooley, Cas. Damages, 159. See "*Damages*," Dec. Dig. (Key No.) § 67; Cent. Dig. §§ 137-145.

<sup>89</sup> *FELL v. UNION PAC. RY. CO.*, 32 Utah, 101, 88 Pac. 1003, 28 L. R. A. (N. S.) 1, Cooley, Cas. Damages, 159; *Schulte v. Louisville & N. R. Co.*, 128 Ky. 627, 108 S. W. 941; *New York, N. H. & H. R. Co. v. Ansonia Land & Water Power Co.*, 72 Conn. 703, 46 Atl. 157; *Black v. Minneapolis & St. L. R. Co.*, 122 Iowa, 32, 96 N. W. 984; *Thomas v. Weed*, 14 Johns. (N. Y.) 255; *Walrath v. Redfield*, 18 N. Y. 457, 462; *Mairs v. Association*, 89 N. Y. 498; *Duryee v. Mayor, etc., of New York*, 96 N. Y. 477, 498; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun (N. Y.) 182; *Moore v. New York El. R. Co.*, 126 N. Y. 671, 27 N. E. 791; *Pennsylvania S. V. R. Co. v. Ziemer*, 124 Pa. 560, 17 Atl. 187; *Black v. Camden & A. R. & Transp. Co.*, 45 Barb. (N. Y.) 40; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Milbank v. Dennistown*, 1 Bosw. (N. Y.) 246. Interest may be recovered on money spent in repairing property injured (*Whitehall Transp. Co. v. New Jersey Steam Boat Co.*, 51 N. Y. 369), or in repurchasing property wrongfully taken and sold (*Dodson v. Cooper*, 37 Kan. 346, 15 Pac. 200; *McInroy v. Dyer*, 47 Pa. 118). "We hold that, in this state, whenever one party has a legal right to recover of another a debt or damages as due at a particular time, he is also entitled to interest as an incident from the maturity of the demand until the trial." *Stoudenmeier v. Williamson*, 29 Ala. 558, 569. Interest has been allowed in an action for death of husband (*Central R. Co. v. Sears*, 66 Ga. 499); and for trespass on land (*Duryee v. Mayor, etc., of New York*, 96 N. Y. 477; *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94); and for diverting water (*Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42). See "*Damages*," Dec. Dig. (Key No.) § 69; Cent. Dig. §§ 137-145.

or indirect evidence of actual value, can be thus increased.<sup>90</sup> It is sometimes said that the jury cannot award interest *eo nomine* in ordinary cases of torts, but that they may consider the lapse of time since the injury in estimating the damages.<sup>91</sup> Thus, in a Pennsylvania case,<sup>92</sup> where interest was claimed on the value of property negligently destroyed, it was said that interest, as such, could not be recovered in actions of tort, or in actions of any kind where the damages were not, in their nature, capable of exact computation, both as to time and amount, but that the jury might allow additional damages, in the nature of interest, for lapse of time. "It is never interest as such, nor as a matter of right, but as compensation for the delay, of which the rate of interest affords fair legal measure." So, in a Massachusetts case,<sup>93</sup> where the action was also for the negligent destruction of property, the court, after noting the fact that interest is allowed as of right in *trover* and other like actions, held that, in an action on the case for the negligent destruction of property, the jury, in their discretion, and as incident to determining the amount of the original loss, might consider the delay caused by the defendant, and that interest on the original damages was a fair measure of the damages caused by the delay. In the supreme court of the United States it was said:<sup>94</sup> "Interest is not allowable as a matter of law, except in cases of

<sup>90</sup> *Western & A. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145.

<sup>91</sup> *Clement v. Spear*, 56 Vt. 401. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145.

<sup>92</sup> *Richards v. Citizens' Natural Gas Co.*, 130 Pa. 37-40, 18 Atl. 600. See, also, *Ide v. Boston & M. R. R.*, 83 Vt. 66, 74 Atl. 401. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145.

<sup>93</sup> *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145.

<sup>94</sup> *Lincoln v. Claflin*, 7 Wall. 132, 139, 19 L. Ed. 106. See, also, *Union Water Power Co. v. Inhabitants of Lewiston*, 101 Me. 564, 65 Atl. 67; *McConnell Bros. v. Slappey*, 134 Ga. 95, 67 S. E. 440; *Mansfield v. New York Cent. & H. R. Co.*, 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566. But see *Bethell v. Mellor & Rittenhouse Co. (D. C.)* 135 Fed. 445. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145.

contract or the unlawful detention of money. In cases of tort, its allowance as damages rests in the discretion of the jury."

*Property Destroyed, Taken, Converted, and the Like*

Where property is destroyed or converted, the title is, or may be regarded as, out of the original owner. The right to recover a pecuniary equivalent, as we have seen,<sup>95</sup> vests absolutely, at once; and, compensation for the loss of future use of the property cannot be recovered, but only compensation for the detention of money, i. e. interest. Therefore, in actions of trover, trespass, replevin, and the like, interest is recoverable on the value of the property from the time of the taking.<sup>96</sup> The right to interest as a part of the damages, in

<sup>95</sup> Ante, p. 2.

<sup>96</sup> *Ekins v. East India Co.*, 1 P. Wms. 395; *Hamer v. Hathaway*, 33 Cal. 117; *Clark v. Whitaker*, 19 Conn. 320, 48 Am. Dec. 160; *Woodworth v. Gorsline*, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417; *Durham v. Commercial Nat. Bank*, 45 Or. 385, 77 Pac. 902; *Webb v. Phillips*, 80 Fed. 954, 26 C. C. A. 272; *Redmond v. American Mfg. Co.*, 121 N. Y. 415, 24 N. E. 924; *Tuller v. Carter*, 59 Ga. 395; *Sanders v. Vance*, 7 T. B. Mon. 209, 18 Am. Dec. 167; *New Orleans Draining Co. v. De Lizardi*, 2 La. Ann. 281; *Hayden v. Bartlett*, 35 Me. 203; *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239; *Robinson v. Barrows*, 48 Me. 186; *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211, 9 Am. Dec. 512; *Thomas v. Sternheimer*, 29 Md. 268; *Maury v. Coyle*, 34 Md. 235; *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Negus v. Simpson*, 99 Mass. 388; *Winchester v. Craig*, 33 Mich. 205; *Chauncy v. Yeaton*, 1 N. H. 151; *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66; *Stevens v. Low*, 2 Hill (N. Y.) 132; *Andrews v. Durant*, 18 N. Y. 496; *McDonald v. North*, 47 Barb. (N. Y.) 530; *Pease v. Smith*, 5 Lans. (N. Y.) 519; *Wehle v. Butler*, 43 How. Prac. (N. Y.) 5; *Commercial & Agricultural Bank v. Jones*, 18 Tex. 811; *Gillies v. Wofford*, 26 Tex. 76; *Willis v. McNott*, 75 Tex. 69, 12 S. W. 478; *Rhemke v. Clinton*, 2 Utah, 230; *Grant v. King*, 14 Vt. 367; *Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Bigelow v. Doolittle*, 36 Wis. 115. Contra, *Palmer v. Murray*, 8 Mont. 312, 21 Pac. 126. And see *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641. In *Stephens v. Koonce*, 103 N. C. 266, 9 S. E. 315; the allowance was held discretionary with the jury. Where demand is necessary to establish the conversion, interest is recoverable only from demand. *Garrard*



actions of trover and trespass de bonis asportatis, was given, first, in England, by the statute of 3 & 4 Wm. IV. By that statute, the allowance was discretionary with the jury. Early cases in this country followed the English rule,<sup>97</sup> but gradually

v. Dawson, 49 Ga. 434; Northern Transp. Co. v. Sellick, 52 Ill. 249; Johnson v. Sumner, 1 Metc. (Mass.) 172; Schwerin v. McKie, 51 N. Y. 180, 10 Am. Rep. 609. In an action against a common carrier for the loss of goods, interest is allowed on their value. Mobile & M. Ry. Co. v. Jurey use of Factors & T. Ins. Co., 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Woodward v. Illinois Cent. R. Co., 1 Biss. 403, Fed. Cas. No. 18,006; Fraloff v. New York Cent. & H. R. Co., 10 Blatchf. 16, Fed. Cas. No. 5,025; The Gold Hunter, 1 Blatchf. & H. 300, Fed. Cas. No. 5,513; Parrott v. Housatonic R. Co., 47 Conn. 575; Mote v. Railroad Co., 27 Iowa, 22; Robinson v. Merchants' Despatch Transp. Co., 45 Iowa, 470; Cowley v. Davidson, 13 Minn. 92 (Gil. 86); McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303; Duryea v. Mayor, etc., of New York, 26 Hun (N. Y.) 120; Erie Ry. Co. v. Lockwood, 28 Ohio St. 358; Newell v. Smith, 49 Vt. 255; Whitney v. Chicago & N. W. R. Co., 27 Wis. 327. Contra, De Steiger v. Hannibal & St. J. R. Co., 73 Mo. 33; Fowler v. Davenport, 21 Tex. 626. "In an action for destroying or carrying off property, the plaintiff recovers interest from the time of the wrongful act." Sedg. Dam. § 316; Fail's Adm'r v. Presley's Adm'r, 50 Ala. 342; Oviatt v. Pond, 29 Conn. 479; Brown v. Southwestern R. Co., 36 Ga. 377; Bradley v. Geiselman, 22 Ill. 494; Johnson v. Chicago & N. W. R. Co., 77 Iowa, 666, 42 N. W. 512; Buffalo & H. Turnpike Co. v. City of Buffalo, 58 N. Y. 639; Mairs v. Manhattan Real Estate Ass'n, 89 N. Y. 498; City of Allegheny v. Campbell, 107 Pa. 530, 52 Am. Rep. 478; Texas & P. R. Co. v. Tankersley, 63 Tex. 57. Contra, Green v. Garcia, 3 L. Ann. 702, where interest was refused because the demand was unliquidated.

In actions of replevin, where the prevailing party recovers, not the property itself, but its value, interest is allowed from the time the property was taken. Yelton v. Slinkard, 85 Ind. 190; Blackie v. Cooney, 8 Nev. 41; Brizee v. Maybee, 21 Wend. (N. Y.) 144; McDonald v. Scaife, 11 Pa. 381, 51 Am. Dec. 506; Bigelow v. Doolittle, 36 Wis. 115. Damages for detention and interest cannot both be recovered. McCarty v. Quimby, 12 Kan. 494. See "Damages," Dec. Dig. (Key No.) § 69; Cent. Dig. §§ 137-149; "Replevin," Dec. Dig. (Key No.) § 79; Cent. Dig. § 309.

"Beals v. Guernsey, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; Hyde v. Stone, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; Bissell v. Hopkins, 4 Cow. (N. Y.) 53; Rowley v. Gibbs, 14 Johns. (N. Y.) 385. See "Damages," Dec. Dig. (Key No.) § 67; Cent. Dig. §§ 137-145; "Trover and Conversion," Dec. Dig. (Key No.) § 53; Cent. Dig. § 254.

the principle that the right to interest was discretionary with the jury was abandoned, and it is now generally held that the plaintiff is entitled to interest on the value of property converted or lost to the owner by a trespass as a matter of law.<sup>98</sup> The interest is as necessary a part of a complete indemnity in such cases as the value itself, and is no more in the discretion of the jury than the value.<sup>99</sup>

*Same—Destruction by Negligence*

It is difficult to perceive any sound distinction, in this regard, between cases where property is destroyed by a misfeasance, and where it is destroyed by negligence.<sup>100</sup> Some courts, in fact, allow interest in cases of negligence as a matter of law,<sup>101</sup> while others leave it to the discretion of the jury.<sup>102</sup>

<sup>98</sup> *Wilson v. City of Troy*, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145; "*Trover and Conversion*," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* § 254.

<sup>99</sup> *Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303-315; *Buffalo & H. Turnpike Co. v. City of Buffalo*, 58 N. Y. 639; *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361, 369. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145; "*Trover and Conversion*," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* § 254.

<sup>100</sup> In *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361, 369, it was said: "In cases of trover, replevin, and trespass, interest on the value of property unlawfully taken or converted is allowed by way of damages, for the purpose of complete indemnity of the party injured; and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed by the wrongful or negligent act of another may not be included in the damages."

<sup>101</sup> *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 118; *Arthur v. Chicago, R. I. & P. Ry. Co.*, 61 Iowa, 648, 17 N. W. 24; *Buel v. Chicago, R. I. & P. Ry. Co.*, 81 Neb. 430, 116 N. W. 299; *Varco v. Chicago, M. & St. P. Ry. Co.*, 30 Minn. 18, 13 N. W. 921; *Chapman v. Chicago & N. W. Ry. Co.*, 26 Wis. 295, 7 Am. Rep. 81; *Dean v. Chicago & N. W. Ry. Co.*, 43 Wis. 305. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145.

<sup>102</sup> *Western & A. R. Co. v. McCauley*, 68 Ga. 818; *Chicago & N. W. Ry. Co. v. Shultz*, 55 Ill. 421; *Frazier v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620; *JACKSONVILLE, T. & K. W.*



**71. CONDEMNATION PROCEEDINGS**—Where property is taken under the right of eminent domain, interest is recoverable on the amount of the award from the time of the taking.

The taking of property under the right of eminent domain is analogous to a sale. If not agreed on, the damages are assessed as of the time of the taking, and interest on the amount ascertained is allowed as compensation for the detention of the money from that time.<sup>103</sup> The reason for the rule was well stated in a Pennsylvania case:<sup>104</sup> "If the plaintiff was entitled to compensation by reason of her property being taken at a particular time, she was certainly entitled to interest as compensation for its wrongful detention. The company, as well as the plaintiff, could have had the damages assessed as soon as they pleased after locating the road, and it

RY. CO. v. PENINSULAR LAND, TRANSP. & MFG. CO., 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65, Cooley, Cas. Damages, 167; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun (N. Y.) 182. In Lucas v. Wattles, 49 Mich. 380, 13 N. W. 782, it was said to be discretionary with the jury to allow interest from the date of the writ. In Houston & T. C. R. Co. v. Muldrow, 54 Tex. 233, the right to interest was denied absolutely; and in Toledo, P. & W. Ry. Co. v. Johnston, 74 Ill. 83, it was denied in the absence of aggravating circumstances. See "*Damages*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 137-145.

<sup>103</sup> Lough v. Minneapolis & St. L. R. Co., 116 Iowa, 31, 89 N. W. 77, Bangor & P. R. Co. v. McComb, 60 Me. 290; Hay v. Commonwealth, 183 Mass. 294, 67 N. E. 334; Hayes v. Chicago, M. & St. P. R. Co., 64 Iowa, 753, 19 N. W. 245; Hartshorn v. B., C. R. & N. R. Co., 52 Iowa, 613, 3 N. W. 648; Cohen v. St. Louis R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; Reed v. Hanover Branch R. Co., 105 Mass. 303; Kidder v. Inhabitants of Oxford, 116 Mass. 165; Chandler v. Jamacai Pond Aqueduct Corp., 125 Mass. 544; Sioux City, etc., R. Co. v. Brown, 13 Neb. 317, 14 N. W. 407; North Hudson County R. Co. v. Booraem, 28 N. J. Eq. 450; Atlantic & G. W. Ry. Co. v. Koblentz, 21 Ohio St. 334; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123; Velte v. U. S., 76 Wis. 278, 45 N. W. 119; Old Colony R. Co. v. Miller, 125 Mass. 1, 28 Am. Rep. 194; Parks v. City of Boston, 15 Pick. (Mass.) 198. See "*Eminent Domain*," *Dec. Dig. (Key No.)* § 148; *Cent. Dig.* §§ 397-399½.

<sup>104</sup> Delaware, L. & W. R. Co. v. Burson, 61 Pa. 369, 380.

was no reason for withholding compensation that its amount was unknown or unascertained. As the company was the party to pay, it ought to have had the amount ascertained, and paid it. Failing to do so, it has no right to complain at having to meet an incident of the delay in the shape of interest."

**SAME—DEFENDANT NOT RESPONSIBLE FOR  
DELAY**

**72. Where the defendant is not responsible for the delay in making compensation, he is not chargeable with interest.**

Where defendant is in no way responsible for the delay, he is not liable for interest. He may be responsible for the delay, either because his original fault necessarily involves a delay, as where it causes an unliquidated loss which must be submitted to a jury, or because he simply refuses or fails to pay when it is his duty to pay. Where defendant is not responsible for the delay, the loss of interest is not a proximate consequence of his fault, and therefore cannot be recovered. For example, if defendant tenders the amount due, and it is refused, he is not liable for interest after the date of the tender. The loss of it is the debtor's own fault.<sup>105</sup> A debtor is not chargeable with interest on the debt by a delay in its payment, caused by his being summoned as trustee of the creditor in a trustee process. Here the act of the law intervened and caused the loss.<sup>106</sup>

<sup>105</sup> *Thompson v. Boston & M. R.*, 58 N. H. 524. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69, 226; *Cent. Dig.* §§ 135-143, 572; "*Interest*," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* § 114.

<sup>106</sup> Trustee process or injunction will interrupt the running of interest. *Le Grange v. Hamilton*, 4 Term R. 613; *Hamilton v. Le Grange*, 2 H. Bl. 144; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204; *Bainbridge v. Wilcocks*, *Baldw.* 536, *Fed. No.* 755; *Willings v. Consequa*, *Pet. C. C.* 172, 301, *Fed. Cas. Nos.* 17,766, 17,767; *Norris v. Hall*, 18 Me. 332; *Oriental Bank v. Tre-*

**INTEREST ON OVERDUE PAPER—CONTRACT AND  
STATUTE RATE**

**73. Where a contract expressly provides for interest after maturity, it will be allowed at the stipulated rate, but where no express provision is made it is held:**

- (a) In some jurisdictions, that interest can be allowed only as damages, and at the statutory rate.**
- (b) In other jurisdictions, that interest accrues by the terms of the contract, and at the stipulated rate.**

The rate at which interest shall be allowed, after maturity of a contract which expressly provides for interest, depends upon the construction of the contract, and raises a question upon which there is great conflict of authority. If the con-

mont Ins. Co., 4 Metc. (Mass.) 1; Bickford v. Rich, 105 Mass. 340; Huntress v. Burbank, 111 Mass. 213; Smith v. Flanders, 129 Mass. 322; Le Branthwait v. Halsey, 9 N. J. Law, 3; Kellogg v. Hickok, 1 Wend. (N. Y.) 521; Stevens v. Barringer, 13 Wend. (N. Y.) 639; Fitzgerald v. Caldwell, 2 Dall. 215, 1 L. Ed. 354; Id., 1 Yeates (Pa.) 274; Jackson's Ex'rs v. Lloyd, 44 Pa. 82. In some states a garnishee or person enjoined must bring the money into court, or he will be chargeable with interest. Kirkman v. Vanlier, 7 Ala. 217; Godwin v. McGehee, 19 Ala. 468; Bullock v. Ferguson, 30 Ala. 227; Curd v. Letcher, 3 J. J. Marsh. (Ky.) 443; Smith v. German Bank, 60 Miss. 69; Candee v. Webster, 9 Ohio St. 452; Templeman v. Fauntleroy, 3 Rand. (Va.) 434. If the garnishee denies his indebtedness, or is in collusion with either party, he is liable for interest. Work v. Glaskins, 33 Miss. 539; Stevens v. Gwathmey, 9 Mo. 636; Rushton v. Rowe, 64 Pa. 63; Jones v. Manufacturers' Nat. Bank, 99 Pa. 317. So, also, if he actually used the money. Mattingly v. Boyd, 20 How. 128, 15 L. Ed. 845; Norris v. Hall, 18 Me. 332. In such case interest is allowed at the market rate, not the statutory rate. Greenish v. Standard Sugar Refinery, 2 Lowell, 553, Fed. Cas. No. 5,776. Interest as damages does not accrue in time of war, where the debtor is

tract expressly provides for interest after maturity, if default is then made, it is recoverable, not as damages for the detention of the money, but under the contract, as part of the debt; and, of course, the stipulated rate governs. Upon this point the authorities are agreed. But where the contract merely provides for interest, and is silent as to interest after maturity, in many jurisdictions it is held that the contract is broken by nonpayment at maturity, and that only a claim for damages remains, and that, therefore, interest is allowed as damages, and at the statutory rate.<sup>107</sup> In other jurisdictions,

in one hostile country and the creditor in the other. Interest accruing by contract is not affected. *Hoare v. Allen*, 2 Dall. 102, 1 L. Ed. 307; *Foxcraft v. Nagle*, 2 Dall. 132, 1 L. Ed. 319; *Bigler v. Waller, Chase*, 316, Fed. Cas. No. 1,404; *Mayer v. Reed*, 37 Ga. 482; *Selden v. Preston*, 11 Bush (Ky.) 191; *Bordley v. Eden*, 3 Har. & McH. (Md.) 167; *Brewer v. Hastie*, 3 Call (Va.) 22; *Lash v. Lambert*, 15 Minn. 416 (Gil. 336), 2 Am. Rep. 142; *Brown v. Hiatts*, 15 Wall. 177, 21 L. Ed. 128. If the creditor has an agent in the same country with the debtor, interest does not cease; for it is the debtor's duty to pay the agent. *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207; *Conn v. Penn*, Pet. C. C. 496, Fed. Cas. No. 3,104; *Denniston v. Imbrie*, 3 Wash. C. C. 396, note, Fed. Cas. No. 3,802. And see *Bean v. Chapman*, 62 Ala. 58. Generally, as to what will relieve a debtor from interest, see *Miller v. Bank of New Orleans*, 5 Whart. 503, 34 Am. Dec. 571; *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 3 Sup. Ct. 570, 28 L. Ed. 109; *Bartells v. Redfield* (C. C.) 27 Fed. 286; *Stewart v. Schell* (C. C.) 31 Fed. 65; *Laura Jane v. Hagen*, 10 Humph. (Tenn.) 332. Where the happening of an event upon which a debt was to become due was unknown to defendant, but was not within the special knowledge of plaintiff, the defendant is nevertheless liable for interest. *Sumner v. Beebe*, 37 Vt. 562. See "*Garnishment*," *Dec. Dig. (Key No.)* § 115; *Cent. Dig.* § 234.

<sup>107</sup> *Cook v. Fowler*, L. R. 7 H. L. 27; *Goodchap v. Roberts*, 14 Ch. Div. 49 (contra, *Keene v. Keene*, 3 C. B. [N. S.] 144); *Gardner v. Barnett*, 36 Ark. 476; *Pettigrew v. Summers*, 32 Ark. 571; *Woodruff v. Webb*, Id. 612; *Newton v. Kennerly*, 31 Ark. 626, 25 Am. Rep. 592; *Kohler v. Smith*, 2 Cal. 597, 56 Am. Dec. 369; *Cummings v. Howard*, 63 Cal. 503; *First Ecclesiastical Soc. of Suffield v. Loomis*, 42 Conn. 570; *Jefferson County v. Lewis*, 20 Fla. 980; *Robinson v. Kinney*, 2 Kan. 184; *Searle v. Adams*, 3 Kan. 515, 89 Am. Dec. 598; *Rilling v. Thompson*, 12 Bush (Ky.) 310; *Duran v. Ayer*, 67 Me. 145; *Eaton v. Boissonnault*, 67 Me.

however, it is held that there is an implied contract to pay the agreed rate after maturity, and that such interest is given under the contract, and not as damages.<sup>108</sup> The objection to

540, 24 Am. Rep. 52; Brown v. Hardcastle, 63 Md. 484; Talcott v. Marston, 3 Minn. 339 (Gil. 238); Daniels v. Ward, 4 Minn. 168 (Gil. 113); Chapin v. Murphy, 5 Minn. 474 (Gil. 383); Moreland v. Lawrence, 23 Minn. 84; Ashuelot R. Co. v. Elliott, 57 N. H. 397; Macomber v. Dunham, 8 Wend. (N. Y.) 550; U. S. Bank v. Chapin, 9 Wend. (N. Y.) 471; Hamilton v. Van Rensselaer, 43 N. Y. 244; Southern Cent. R. Co. v. Moravia, 61 Barb. 180 (contra, Miller v. Burroughs, 4 Johns. Ch. 436); Genet v. Kissam, 53 N. Y. Super. Ct. 43; Ludwick v. Huntzinger, 5 Watts & S. 51; Pearce v. Hennessy, 10 R. I. 223; Langston v. South Carolina R. Co., 2 S. C. 248; Briggs v. Winsmith, 10 S. C. 133, 30 Am. Rep. 46; Maner v. Wilson, 16 S. C. 469; Thatcher v. Massey, 20 S. C. 542; Perry v. Taylor, 1 Utah, 63. The supreme court of the United States has adopted the statutory rate as the true rule. Brewster v. Wakefield, 22 How. 118, 16 L. Ed. 301; Bernhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766; Holden v. Freeman's Sav. & Tr. Co., 100 U. S. 72, 25 L. Ed. 567. But it will consider itself bound by the decisions of the state courts, as on a question of local law. Cromwell v. County of Sac, 96 U. S. 51, 24 L. Ed. 681. In Indiana, the rule of the statutory rate was first established. Burns v. Anderson, 68 Ind. 202, 34 Am. Rep. 250; Richards v. McPherson, 74 Ind. 158. These cases were overruled, and the rule of the contract rate established, by Shaw v. Rigby, 84 Ind. 375, 43 Am. Rep. 96. This was an action on a note payable in one day, and clearly intended as a continuing security. It was unnecessary to overrule the prior cases to arrive at the result. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67-69; *Cent. Dig.* §§ 142, 571; "*Interest*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 77, 78.

<sup>108</sup> Phinney v. Baldwin, 16 Ill. 108, 61 Am. Dec. 62; Etnyre v. McDaniel, 28 Ill. 201; Shaw v. Rigby, 84 Ind. 375, 43 Am. Rep. 96; Kimmel v. Burns, Id. 370; Kerr v. Haverstick, 94 Ind. 178; Hand v. Armstrong, 18 Iowa, 324; Thompson v. Pickel, 20 Iowa, 490; Brannon v. Hursell, 112 Mass. 63; Union Sav. Inst. v. City of Boston, 129 Mass. 82, 37 Am. Rep. 305; Forster v. Forster, Id. 559; Downer v. Whittier, 144 Mass. 448, 11 N. E. 585; Warner v. Juif, 38 Mich. 662; Meaders v. Gray, 60 Miss. 400, 45 Am. Rep. 414; Broadway Sav. Bank v. Forbes, 79 Mo. 226; Borders v. Barber, 81 Mo. 636; Macon County v. Rodgers, 84 Mo. 66; Kellogg v. Lavender, 15 Neb. 256, 18 N. W. 38, 48 Am. Rep. 339; Monnett v. Sturges, 25 Ohio St. 384; Marietta Iron Works v. Lottimer, Id. 621; Hydraulic Co. v. Chatfield, 38 Ohio St. 575; Overton v. Bolton, 9 Heisk. (Tenn.) 762, 24 Am. Rep. 367; Pridgen v. Andrews, 7 Tex. 461; Hopkins v. Crittenden, 10 Tex.

the doctrine of an implied agreement to pay the stipulated rate after maturity is that it introduces a provision into the contract which its terms do not cover, and thus makes for the parties a contract which they have not made for themselves.<sup>109</sup> Again, it might be reasonable, and under some circumstances the debtor might be very willing to pay the stipulated rate for a short time; but it does not follow that it would be reasonable or that the debtor would be willing to pay at the same rate, if, for some unforeseen cause, payment of the note should be delayed a considerable length of time.<sup>110</sup>

The clear intent of the parties always governs. The cases are unanimous upon this point. Thus, where a contract for the payment of money stipulates for interest "until paid,"<sup>111</sup> "annually,"<sup>112</sup> "annually upon the whole amount unpaid,"<sup>113</sup> the intent is unmistakable, and interest is recovered, after

189; *Cecil v. Hicks*, 29 Grat. (Va.) 1, 26 Am. Rep. 391; *Shipman v. Bailey*, 20 W. Va. 140; *Pickens v. McCoy*, 24 W. Va. 344; *Spencer v. Maxfield*, 16 Wis. 178; *Pruyn v. City of Milwaukee*, 18 Wis. 367. See "Damages," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 142, 571; "Interest," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 77, 78.

<sup>109</sup> *Sedg. Dam.* § 329.

<sup>110</sup> *Cook v. Fowler*, L. R. 7 H. L. 27. See "Damages," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "Interest," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 77, 78.

<sup>111</sup> *Latham v. Darling*, 1 Scam. (Ill.) 203; *Dudley v. Reynolds*, 1 Kan. 285; *Small v. Douthitt*, Id. 335; *Young v. Thompson*, 2 Kan. 83; *Broadway Sav. Bank v. Forbes*, 79 Mo. 226; *Hager v. Blake*, 16 Neb. 12, 19 N. W. 780; *Taylor v. Wing*, 84 N. Y. 471; *Lanahan v. Ward*, 10 R. I. 299; *Mobley v. Davega*, 16 S. C. 73, 42 Am. Rep. 632. See "Damages," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "Interest," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 77, 78; "Bills and Notes," *Cent. Dig.* § 281.

<sup>112</sup> *Westfield v. Westfield*, 19 S. C. 85. See "Damages," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "Bills and Notes," *Cent. Dig.* § 281.

<sup>113</sup> *Miller v. Hall*, 18 S. C. 141; *Miller v. Edwards*, Id. 600. See "Damages," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "Interest," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* § 77; "Bills and Notes," *Cent. Dig.* § 281.

maturity, under the contract, at the stipulated rate.<sup>114</sup> So, also, where a note is payable on demand,<sup>115</sup> or one day after date,<sup>116</sup> the intent to make a continuing obligation is obvious, and therefore interest will be allowed at the stipulated rate.

A stipulation for interest after maturity is, in effect, an agreement for liquidated damages. Where the stipulated rate after maturity is higher than before, recovery has been denied, on the ground that it was a penalty.<sup>117</sup> So, also, it has been refused where the rate was grossly excessive.<sup>118</sup> But usually a higher rate may be recovered.<sup>119</sup>

<sup>114</sup> Where the contract stipulates for interest "till the principal sum shall be payable," interest at the stipulated rate cannot be recovered after maturity. *Spaulding v. Lord*, 19 Wis. 533. See "*Damages*," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "*Interest*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 77, 78; "*Bills and Notes*," *Cent. Dig.* § 281.

<sup>115</sup> *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21. See "*Damages*," *Dec. Dig. (Key No.)* § 226; *Cent. Dig.* § 571; "*Interest*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* § 77; "*Bills and Notes*," *Cent. Dig.* § 281.

<sup>116</sup> *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5; *Gray v. Briscoe*, 6 Bush (Ky.) 687; *Sharpe v. Lee*, 14 S. C. 341; *Piester v. Piester*, 22 S. C. 139, 53 Am. Rep. 711. See "*Interest*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* § 77; "*Bills and Notes*," *Cent. Dig.* § 281.

<sup>117</sup> *Mason v. Callender*, 2 Minn. 350 (Gil. 302), 72 Am. Dec. 102; *Talcott v. Marston*, 3 Minn. 339 (Gil. 238); *Kent v. Bown*, 3 Minn. 347 (Gil. 246); *Daniels v. Ward*, 4 Minn. 168 (Gil. 113); *Newell v. Houlton*, 22 Minn. 19; *White v. Iltis*, 24 Minn. 43; *Watts v. Watts*, 11 Mo. 547. See "*Interest*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 77, 78; "*Bills and Notes*," *Cent. Dig.* § 281.

<sup>118</sup> *Henry v. Thompson*, Minor (Ala.) 209. See "*Interest*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 77, 78; "*Bills and Notes*," *Cent. Dig.* § 281.

<sup>119</sup> *Herbert v. Railway Co.*, L. R. 2 Eq. 221; *Miller v. Kempner*, 32 Ark. 573; *Portis v. Merrill*, 33 Ark. 416; *Browne v. Steck*, 2 Colo. 70; *Buckingham v. Orr*, 6 Colo. 587; *Lawrence v. Cowles*, 13 Ill. 577; *Smith v. Whitaker*, 23 Ill. 367; *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Davis v. Rider*, 53 Ill. 416; *Whiterow v. Briggs*, 67 Ill. 96; *Downey v. Beach*, 78 Ill. 53; *Funk v. Buck*, 91 Ill. 575; *Reeves v. Stipp*, Id. 609; *Wernwag v. Mothershead*, 3 Blackf. (Ind.) 401; *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Capen v. Crowell*, 66 Me. 282; *Davis v. Hendrie*, 1 Mont. 499; *Fisher v. Otis*, 3 Pin. (Wis.) 83. See "*Interest*," *Dec. Dig. (Key No.)* § 37; *Cent. Dig.* §§ 77, 78; "*Bills and Notes*," *Cent. Dig.* § 281.

**COMPOUND INTEREST**

**74. Compound interest, or interest upon interest, can be recovered only in the following cases:**

- (a) By special agreement, made after the original interest became due, interest thereon may be recovered.**
- (b) By custom, merchants may make yearly rests in their mutual accounts of principal and interest, and interest accrues on the balance due.**
- (c) Interest coupons, attached to bonds or other securities for the payment of money, bear interest.**
- (d) In cases of fraud or willful wrong, compound interest is sometimes allowed by way of punishment.**
- (e) Interest may be recovered as damages for non-payment of interest due by contract as a debt, but not upon interest due as damages.**

Interest computed upon interest is called "compound interest." It is not favored in the law, and it is a general rule that compound interest cannot be recovered. Even an agreement made at the time of the original contract is of no avail.<sup>120</sup> The disallowance proceeds, not upon the ground of usury (for compound interest is not usury if no more than the lawful rate is charged),<sup>121</sup> but from motives of public policy, because of its harsh and oppressive character. "There is nothing unfair, or, perhaps, illegal, in taking a covenant, originally, that if interest is not paid at the end of the year, it shall be

<sup>120</sup> *State of Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471; *Ossulston v. Yarmouth*, 2 Salk. 449; *Daniell v. Sinclair*, L. R. 6 App. Cas. 181. See "*Interest*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 134-137.

<sup>121</sup> *Bowman v. Neely*, 151 Ill. 37, 37 N. E. 840. See "*Usury*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* §§ 103-106.



converted into principal. But this court will not permit that, as tending to usury, though it is not usury."<sup>122</sup> Chancellor Kent said:<sup>123</sup> "Compound interest cannot be demanded and taken, except upon a special agreement, made after the interest has become due." The general rule that compound interest cannot be recovered is well established,<sup>124</sup> but there are several equally well established exceptions.

After simple interest has accrued and remains unpaid, an agreement that it shall thereafter bear interest is valid.<sup>125</sup> There is nothing harsh or oppressive in such a contract.

It has long been the custom of merchants having mutual accounts to calculate interest on the various items, and to strike a balance of the principal and interest yearly; the sum found due being carried forward as the first item of the mutual account for the succeeding year. This custom con-

<sup>122</sup> *Chambers v. Goldwin*, 9 Ves. 254-271.

<sup>123</sup> *Van Benschooten v. Lawson*, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333. See "Interest," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 134-137; "Usury," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* §§ 103-106.

<sup>124</sup> *Paulling v. Creagh's Adm'r*, 54 Ala. 646; *Mason v. Callender*, 2 Minn. 350 (Gil. 302), 72 Am. Dec. 102; *Hager v. Blake*, 16 Neb. 12, 19 N. W. 780; *Mowry v. Bishop*, 5 Paige (N. Y.) 98; *Averill Coal & Oil Co. v. Verner*, 22 Ohio St. 372; *Genin v. Ingersoll*, 11 W. Va. 549. Contracts in advance for compound interest have been sustained in Oregon (*New England Mortg. Security Co. v. Vader* [C. C.] 28 Fed. 265), in Dakota (*Hovey v. Edmison*, 3 Dak. 449, 22 N. W. 594), and in South Carolina (*Bowen v. Barksdale*, 33 S. C. 142, 11 S. E. 640). See "Interest," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 134-137.

<sup>125</sup> *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Fitzhugh v. McPherson*, 3 Gill (Md.) 408; *Gunn v. Head*, 21 Mo. 432; *Grimes v. Blake*, 16 Ind. 180; *Niles v. Board of Commissioners of Sinking Fund*, 8 Blackf. (Ind.) 158; *Forman v. Forman*, 17 How. Prac. (N. Y.) 255; *Van Benschooten v. Lawson*, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333; *Toll v. Hiller*, 11 Paige (N. Y.) 228; *Barrow v. Rhineland*, 1 Johns. Ch. (N. Y.) 550; *Doe v. Warren*, 7 Me. 48; *Thayer v. Wilmington Star Min. Co. of Coal City*, 105 Ill. 540; *Case v. Fish*, 58 Wis. 56, 15 N. W. 808. A promise to pay interest on arrears of interest for the time already elapsed is binding. *Rose v. City of Bridgeport*, 17 Conn. 243-247; *Camp v. Bates*, 11 Conn. 497. Contra, *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99. See "Usury," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* §§ 103-106.

stitutes a well-recognized exception to the rule against the allowance of compound interest.<sup>126</sup> The right to make rests grows out of the mutuality of dealings. When the mutual dealings cease, so, also, does the right to make rests.<sup>127</sup>

Interest coupons attached to bonds or other securities for the payment of money, when payable to bearer, have by commercial usages the legal effect of promissory notes, and possess the attributes of negotiable paper. They are contracts for the payment of a definite sum of money on a day named, and pass, by commercial usage, as negotiable paper. Interest is almost universally allowed on overdue coupons.<sup>128</sup> Interest

<sup>126</sup> Sedg. Dam. § 344; *Eaton v. Bell*, 5 Barn. & Ald. 34; *Barclay v. Kennedy*, 3 Wash. C. C. 350, Fed. Cas. No. 976; *Von Hemert v. Porter*, 11 Metc. (Mass.) 210; *Stoughton v. Lynch*, 2 Johns. Ch. (N. Y.) 209; *Healy v. Gilman*, 1 Bosw. (N. Y.) 235; *Langdon v. Town of Castleton*, 30 Vt. 285; *Davis v. Smith*, 48 Vt. 52; *Emerson v. Atwater*, 12 Mich. 314; *Carpenter v. Welch*, 40 Vt. 251; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507; *Backus v. Minor*, 3 Cal. 231. See "*Interest*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 134-137.

<sup>127</sup> *Denniston v. Imbrie*, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; *Von Hemert v. Porter*, 11 Metc. (Mass.) 210. See "*Interest*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 134-137.

<sup>128</sup> *Gelpcke v. City of Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42; *Clark v. Iowa City*, 20 Wall. 583, 23 L. Ed. 427; *Town of Genoa v. Woodruff*, 92 U. S. 502, 23 L. Ed. 586; *Amy v. City of Dubuque*, 98 U. S. 470, 25 L. Ed. 228; *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; *Rich v. Town of Seneca Falls*, 19 Blatchf. 558, 8 Fed. 852; *Fauntleroy v. Hannibal*, 5 Dill. 219, Fed. Cas. No. 4,692; *Hollingsworth v. City of Detroit*, 3 McLean, 472, Fed. Cas. No. 6,613; *Huey v. Macon County (C. C.)* 35 Fed. 481; *Harper v. Ely*, 70 Ill. 581; *Humphreys v. Morton*, 100 Ill. 592; *City of Jeffersonville v. Patterson*, 26 Ind. 15, 89 Am. Dec. 448; *Forstall v. Consolidated Ass'n of Planters of Louisiana*, 34 La. Ann. 770; *Com. of Virginia v. State of Maryland*, 32 Md. 501; *Welsh v. First Division of St. Paul & P. R. Co.*, 25 Minn. 314; *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 9; *Burroughs v. Richmond County Com'rs*, 65 N. C. 234; *McLendon v. Anson County Com'rs*, 71 N. C. 38; *Dunlay v. Wiseman*, 2 Disn (Ohio) 398; *North Pennsylvania R. Co. v. Adams*, 54 Pa. 94, 93 Am. Dec. 677; *Langston v. South Carolina R. Co.*, 2 S. C. 248; *Mayor, etc., of Nashville v. First Nat. Bank*, 1 Baxt. (Tenn.) 402; *City of San Antonio v. Lane*, 32 Tex. 405; *Arents v. Com.*, 18 Grat. (Va.)

on the bond is not compounded indefinitely, but once only. These are the reasons why they are excepted from the operation of the general rule.<sup>129</sup> The same reasons apply whenever separate interest notes are given. The allowance of interest in this class of cases may be sustained, too, on the principle, that interest secured by coupons is a debt, on which interest may be given as damages.

As punishment for a fraudulent breach of trust, or other gross or willful wrong, the offender is often charged with compound interest.<sup>130</sup>

Compound interest is never allowed by way of damages.<sup>131</sup> But where, by the terms of a contract, interest is due at a fixed day, it is a debt; and, if not paid when due, interest thereon may be recovered as damages.<sup>132</sup> This secondary

750, 776; *Gibert v. Washington City*, V. M. & G. S. R. Co., 33 Grat. (Va.) 586, 598; *Mills v. Town of Jefferson*, 20 Wis. 54. Contra, *Rose v. City of Bridgeport*, 17 Conn. 243; *Force v. City of Elizabeth*, 28 N. J. Eq. 408. See "*Interest*," *Dec. Dig. (Key No.)* § 17; *Cent. Dig.* §§ 30, 31.

<sup>129</sup> *Bowman v. Neely*, 151 Ill. 37, 37 N. E. 840. See "*Interest*," *Dec. Dig. (Key No.)* §§ 17, 60; *Cent. Dig.* §§ 30, 31, 134-137.

<sup>130</sup> *Ackerman v. Emott*, 4 Barb. (N. Y.) 626. Where a trustee uses trust funds for his own benefit, he is liable for compound interest. *Merrifield v. Longmire*, 66 Cal. 180, 4 Prac. 1176; *State v. Howarth*, 48 Conn. 207; *Jennison v. Hapgood*, 10 Pick. (Mass.) 77; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507. See "*Trusts*," *Dec. Dig. (Key No.)* § 219; *Cent. Dig.* §§ 314-317.

<sup>131</sup> *Lewis v. Small*, 75 Me. 323. See "*Damages*," *Dec. Dig. (Key No.)* §§ 125, 226; *Cent. Dig.* §§ 339-343, 571, 572.

<sup>132</sup> *Calhoun v. Marshall*, 61 Ga. 275, 34 Am. Rep. 99; *Tillman v. Morton*, 65 Ga. 386; *Mann v. Cross*, 9 Iowa, 327; *Hershey v. Hershey*, 18 Iowa, 24; *Preston v. Walker*, 26 Iowa, 205, 96 Am. Dec. 140; *Burrows v. Stryker*, 47 Iowa, 477; *Talliaferro's Ex'rs v. King's Adm'r*, 9 Dana (Ky.) 331, 35 Am. Dec. 140; *Peirce v. Rowe*, 1 N. H. 179; *Bledsoe v. Nixon*, 69 N. C. 89, 12 Am. Rep. 642; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Cramer v. Lepper*, 26 Ohio St. 59, 20 Am. Rep. 756; *Wheaton v. Pike*, 9 R. I. 132, 98 Am. Dec. 377, 11 Am. Rep. 227; *Lanahan v. Ward*, 10 R. I. 299; *Henderson v. Laurens*, 2 Desaus. (S. C.) 170; *Singleton v. Lewis*, 2 Hill (S. C.) 408; *Gibbs v. Chisolm*, 2 Nott & McC. (S. C.) 38, 10 Am. Dec. 560; *Doig v. Barkley*, 3 Rich. (S. C.) 125, 45 Am. Dec. 762; *O'Neill v. Bookman*, 9 Rich. (S. C.) 80; *House v. Tennessee Female College*, 7 Heisk. (Tenn.) 128; *Lewis v. Paschal's Adm'r*, 37 Tex. 315; *Catlin v. Lyman*, 16

interest does not, in turn, bear interest. For example, to ascertain the amount due on a matured obligation stipulating for the payment of interest at stated times, simple interest should be calculated from maturity on the principal sum plus the unpaid interest contracted for. Interest cannot be recovered on the amount due as damages for the nonpayment of the contractual interest.<sup>183</sup> So, in an action on a note stipulating for interest after maturity, and providing that, if the interest were not paid annually, it should become principal, and bear interest at the same rate, it was held <sup>184</sup> that the unpaid interest due at maturity of the note, and each successive annual installment of interest from that date, bore interest—not, however, so as to compound the interest on the amounts in default. Simple interest only was allowed on the arrears of contractual interest, the court holding that only the interest on the principal became principal, and bore interest

Vt. 44 (contra, *Broughton v. Mitchell*, 64 Ala. 210); *Montgomery v. Tutt*, 11 Cal. 307; *Doe v. Vallejo*, 29 Cal. 385; *Denver Brick & Manuf'g Co. v. McAllister*, 6 Colo. 261; *Rose v. City of Bridgeport*, 17 Conn. 243; *Leonard v. Villars*, 23 Ill. 377; *Niles v. Board of Com'rs of Sinking Fund*, 8 Blatckf. (Ind.) 158; *Doe v. Warren*, 7 Me. 48; *Banks v. McClellan*, 24 Md. 62, 87 Am. Dec. 594 (contra, *Fitzhugh v. McPherson*, 3 Gill [Md.] 408); *Hastings v. Wiswall*, 8 Mass. 455; *Henry v. Flagg*, 13 Metc. (Mass.) 64; *Van Huse v. Kanouse*, 13 Mich. 303; *Dyar v. Slingerland*, 24 Minn. 267; *Corrigan v. Trenton Delaware Falls Co.*, 5 N. J. Eq. 232, 245; *Mowry v. Bishop*, 5 Paige (N. Y.) 98; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99 (contra, *Howard v. Farley*, 3 Rob. [N. Y.] 599); *Sparks v. Garrigues*, 1 Bin. (Pa.) 152; *Stockely v. Thompson*, 34 Pa. 210; *Pindall v. Bank of Marietta*, 10 Leigh (Va.) 481; *Genin v. Ingersoll*, 11 W. Va. 549. Interest may be recovered on the arrears of an annuity. *Elliott v. Beeson*, 1 Har. (Del.) 106; *Houston v. Jamison's Adm'r*, 4 Har. (Del.) 330. Contra, *Isenhardt v. Brown*, 2 Edw. 341; *Adams v. Adams*, 10 Leigh (Va.) 527. Even though it is in the form of interest on a fixed sum. *Knettle v. Crouse*, 6 Watts (Pa.) 123; *Addams v. Heffernan*, 9 Watts (Pa.) 529. See "*Damages*," *Dec. Dig. (Key No.)* §§ 67, 125; *Cent. Dig.* §§ 135, 136, 339-343.

<sup>183</sup> *Wheaton v. Pike*, 9 R. I. 132, 98 Am. Dec. 377, 11 Am. Rep. 227; *Bledsoe v. Nixon*, 69 N. C. 89. See "*Damages*," *Dec. Dig. (Key No.)* §§ 125, 226; *Cent. Dig.* §§ 339-343, 571, 572.

<sup>184</sup> *Vaughan v. Kennan*, 38 Ark. 114. See "*Damages*," *Dec. Dig. (Key No.)* §§ 125, 226; *Cent. Dig.* §§ 339-443, 571, 572.

**CHAPTER VI****VALUE**

- 75. Definition.
- 76. How Estimated.
- 77-78. Market Value.
- 79. Value Peculiar to Owner.
- 80-81. Pretium Affectionis.
- 82. Time and Place of Assessment.
- 83-84. Highest Intermediate Value.
- 85-86. Medium of Payment—Legal Tenders.

**DEFINITION**

**75. Value is the estimated or appraised worth of a thing, calculated in money—its pecuniary equivalent.**

In speaking of the principles upon which compensation is awarded, we have had frequent occasion to refer to the "value" of the thing in question as furnishing the measure of recovery. In this chapter it is proposed to discuss the methods of ascertaining such value, and the elements that enter into the calculation.

The value of a thing is simply its pecuniary equivalent. Compensatory damages are intended as a pecuniary equivalent for the thing lost by defendant's wrong, and it follows that the assessment of compensatory damages, in almost every case, resolves itself primarily into an inquiry as to value. Where property is lost, converted, or destroyed, the owner is compensated when he receives its full value in money. Where a contract is broken, the value of the thing contracted for is the measure of compensation. Where a tort results in personal injury, the value of the time and labor lost, the medical attendance, etc., is an element, though not the only one, of compensation.

**HOW ESTIMATED****76. The value of property must be estimated with reference to the most valuable present or future use for which it is adapted.**

It is obvious that the value of a thing does not depend upon the use to which it is put by the owner. Property may be stored in safe-deposit vaults and not used at all; but it is none the less valuable. It is the most advantageous possible use to which property may be put, and not the actual use to which it is put, that determines its value.<sup>1</sup> Thus, it was held, in an action for use and occupation of a building adapted for use as a machine shop, that its rental value as a machine shop could be recovered, though defendant had used it only for storage.<sup>2</sup> And in estimating the value of a horse it was said: "Perhaps he would not have been worth anything as a fast trotter, or as a gentleman's carriage horse, because not adapted to the work; but that would not depreciate his value as a cart horse, for which purpose he was to be used."<sup>3</sup> So, also, in estimating the value of a cow, her exceptional value for breeding purposes, because of her thoroughbred blood, must be considered, and it would be error to limit the inquiry to her value for beef or milking purposes.<sup>4</sup>

<sup>1</sup> *Lowe v. City of Omaha*, 33 Neb. 587, 50 N. W. 760; *Maul v. Drexel*, 55 Neb. 446, 76 N. W. 163. See "Damages," *Dec. Dig. (Key No.)* § 103; *Cent. Dig.* §§ 260-264.

<sup>2</sup> *Horton v. Cooley*, 135 Mass. 589. See, also, *Lake Erie & W. R. Co. v. Griffin*, 25 Ind. App. 138, 53 N. E. 1042, 57 N. E. 722; *St. Louis Trust Co. v. Bambrick*, 149 Mo. 560, 51 S. W. 706. But see *Reiser v. City of New York*, 35 Misc. Rep. 413, 71 N. Y. Supp. 965 (affirmed in 69 App. Div. 302, 74 N. Y. Supp. 673, and 174 N. Y. 196, 66 N. E. 731), holding that, where lands are not commonly rentable, rental value is not a proper measure of damages. See "Use and Occupation," *Dec. Dig. (Key No.)* § 10; *Cent. Dig.* § 26.

<sup>3</sup> *Farrel v. Colwell*, 30 N. J. Law, 123, 127. See "Damages," *Dec. Dig. (Key No.)* §§ 105, 174; *Cent. Dig.* §§ 269, 462.

<sup>4</sup> *Central Branch Union Pac. R. Co. v. Nichols*, 24 Kan. 242. The value of the cows as milch cows, and not their value merely as beef, may be shown. *Southwestern Telegraph & Tele-*



Any possible future use must be considered in fixing the present value.<sup>5</sup> The possibility must not be merely speculative or conjectural, but must be reasonably certain, and such as to affect the selling price in the market.<sup>6</sup> "A man may have property well situated for a certain purpose—such as a mill site, or as a farm, or as a residence or store, or as a mine—and he may refuse to use it for any one of those purposes to which it is best suited. Still he may sell it in open market to a purchaser whose opinion of its present market value is based upon the future use to which it may be put. So he may claim, in any proceeding to condemn that land, the market value thereof, as that value is fixed by the public for those purposes. The difference between such a valuation and speculation seems clear. Land never used by its owner for any purpose is sought to be condemned. The fertility of the soil is one of the characteristics or properties of that land. It has never produced any returns; but there is no attempt to prove future productions. They are speculative. The fertility of the soil is a fact—a fact which in some cases may add great value to the property, and may be one of the constituents of the market

phone Co. v. Krause (Tex. Civ. App.) 92 S. W. 431; Taylor v. Spokane Falls & N. Ry. Co., 32 Wash. 450, 73 Pac. 499. Where a mare was killed, her special value as a brood mare was shown. Campbell v. Iowa Cent. R. Co., 124 Iowa, 248, 99 N. W. 1061. The pedigree of a dog killed may be shown on the question of damages. Citizens' Rapid-Transit Co. v. Dew, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518, 66 Am. St. Rep. 754. See "Damages," Dec. Dig. (Key No.) § 105; Cent. Dig. § 269; "Carriers," Dec. Dig. (Key No.) § 229; Cent. Dig. §§ 930, 963, 964.

<sup>5</sup> Reed v. Ohio & M. Ry. Co., 126 Ill. 48, 17 N. E. 807; Ellington v. Bennett, 59 Ga. 286; Shenango & A. R. Co. v. Braham, 79 Pa. 447; Lowe v. City of Omaha, 33 Neb. 587, 50 N. W. 760; Maul v. Drexel, 55 Neb. 446, 76 N. W. 163; Moore v. Hall, 3 Q. B. Div. 178; Holland v. Worley, 26 Ch. Div. 578. See "Damages," Dec. Dig. (Key No.) §§ 103, 105, 108; Cent. Dig. §§ 260-273; "Eminent Domain," Dec. Dig. (Key No.) § 134; Cent. Dig. § 356.

<sup>6</sup> CALUMET RIVER RY. CO. v. MOORE, 124 Ill. 329, 15 N. E. 764, Cooley, Cas. Damages, 165. And see Sedg. Dam. § 253. See "Damages," Dec. Dig. (Key No.) §§ 103-108; Cent. Dig. §§ 260-273; "Eminent Domain," Dec. Dig. (Key No.) § 134; Cent. Dig. § 356.

price."<sup>7</sup> It was accordingly held<sup>8</sup> that, in proceedings for the condemnation of a mining claim for railroad purposes, the owner may prove the value of the land for town-lot purposes, whether built upon or not, in addition to proving its value as a prospect; but his recovery is confined to its value for one or the other purpose. Stated generally, the price to be paid for land taken in condemnation proceedings is its value for any purpose for which it is shown by the evidence to be available, and not simply its value as land as it is at the time.<sup>9</sup>

### MARKET VALUE

**77. The market value is the price or rate at which a thing is sold.**

**78. The market value of an article is merely evidence of its real value, and is not conclusive.**

The market value is the price or rate at which a thing is sold.<sup>10</sup> To make a market, there must be buying and selling. "If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, or the actual circumstances

<sup>7</sup> *Montana R. Co. v. Warren*, 6 Mont. 275, 12 Pac. 641. See "*Eminent Domain*," *Dec. Dig. (Key No.)* §§ 131-134; *Cent. Dig.* §§ 353-356.

<sup>8</sup> *Id.*

<sup>9</sup> *Reed v. Ohio & M. Ry. Co.*, 126 Ill. 48, 17 N. E. 807; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 407, 25 L. Ed. 206. See "*Eminent Domain*," *Dec. Dig. (Key No.)* §§ 131-134; *Cent. Dig.* §§ 353-356.

<sup>10</sup> *Blydenburgh v. Welsh*, Baldw. 331, 340, Fed. Cas. No. 1,583. See "*Damages*," *Dec. Dig. (Key No.)* §§ 103, 105; *Cent. Dig.* §§ 260-271.



which affect the market, but according to what, in their opinion, will be its market price or value provided the rumor shall prove to be true. In such case, it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages is to make a defendant pay what never, in truth, was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance."<sup>11</sup> The market value is the fair cash value if sold in the market for cash, and not on time.<sup>12</sup> A single sale will not establish a market value.<sup>13</sup>

#### *Value in Nearest Market*

Where there is no market for the article at the place where its value is to be estimated, the value at the nearest market is taken as a basis, and an allowance is made for the cost of transportation, the object being to ascertain the real value at the place of compensation.<sup>14</sup>

<sup>11</sup> *Id.*

<sup>12</sup> *Brown v. Calumet River Ry. Co.*, 125 Ill. 600, 18 N. E. 283. See "*Damages*," *Dec. Dig. (Key No.)* §§ 103, 105; *Cent. Dig.* §§ 260-271.

<sup>13</sup> *Graham v. Maitland*, 1 Sweeny (N. Y.) 149. See "*Damages*," *Dec. Dig. (Key No.)* §§ 103, 105; *Cent. Dig.* §§ 260-271.

<sup>14</sup> *Bullard v. Stane*, 67 Cal. 477, 8 Pac. 17; *Chicago G. W. Ry. Co. v. Gitchell*, 95 Ill. App. 1; *George R. Barse Livestock Commission Co. v. McKinster*, 10 Okl. 708, 64 Pac. 14; *Sellar v. Clelland*, 2 Colo. 532; *Furlong v. Polleys*, 30 Me. 491, 50 Am. Dec. 635; *Berry v. Dwinel*, 44 Me. 255; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Wemple v. Stewart*, 23 Barb. (N. Y.) 154; *Grand Tower Min., Mfg & Transp. Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71; *O'Hanlan v. Railway Co.*, 6 Best & S. 484, 34 Law J. (N. S.) Q. B. 154. If the nearest market is resorted to by persons from the place where the value is to be estimated as a place of purchase, the transportation charges must be added. See cases cited *supra*. If such market is a point of sale—that is, if the goods are worth more there than at the place where their value is to be estimated—the cost of transportation must be deducted. *Harris v. Panama R. Co.*, 58 N. Y. 660; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. 49. See, also, *Glaspy v. Cabot*, 135

*Value of Property in Course of Manufacture*

The value of articles partially manufactured is the value they would have when completed, less the cost of completing them.<sup>15</sup>

*Value of Property for Which There Is No Market Value*

A market value, as signifying a price established by sales in the ordinary course of business, is not necessary to a judicial valuation. Property is often subject to such valuation for which no proof of value in the market could be given, because it is not bought and sold in the ordinary course of trade, and is not known in the market. In such cases the real value is to be ascertained from such elements of value as are attainable.<sup>16</sup> "The market price, in the ordinary sense, is generally, but not always, the test of value. For such a tort as a conversion of goods, a plaintiff may be entitled to large damages, though unable to sell the goods at any price. He may be greatly injured by the loss of goods which he cannot sell, but

Mass. 435. Cf. *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *McDonald v. Unaka Timber Co.*, 88 Tenn. 38, 12 S. W. 420; *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 62 Am. St. Rep. 772; *Hendrie v. Neelon*, 12 Ont. App. 41; *Saunders v. Clark*, 106 Mass. 331. It is presumed, prima facie, that goods are worth as much at the point of destination as at the place of shipment. *Rome R. Co. v. Sloan*, 39 Ga. 636; *South & N. A. R. Co. v. Wood*, 72 Ala. 451; *Echols v. Louisville & N. R. Co.*, 90 Ala. 366, 7 South. 655; *Richmond v. Bronson*, 5 Denio (N. Y.) 55. See "*Carriers*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* §§ 599-604½; "*Sales*," *Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1290.

<sup>15</sup> *Emmons v. Westfield Bank*, 97 Mass. 230. See "*Damages*," *Dec. Dig. (Key No.)* §§ 103-105; *Cent. Dig.* §§ 260-271; "*Attachment*," *Cent. Dig.* § 1398.

<sup>16</sup> *Murray v. Stanton*, 99 Mass. 345; *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; *International & G. N. R. Co. v. Carr* (Tex. Civ. App.) 91 S. W. 858. "If at any particular time there be no market demand for an article, it is not on that account of no value." *Trout v. Kennedy*, 47 Pa. 387, 393. In *Erie & P. R. Co. v. Douthet*, 88 Pa. 243, 32 Am. Rep. 451, the value of a pass for life for an entire family over a railroad was estimated. But see *Brown v. St. Paul, M. & M. R. Co.*, 36 Minn. 236, 31 N. W. 941. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* § 1182.

HALF DAM. (2D ED.)—18

which would be productive of great benefit, and therefore would be of great value, without a sale."<sup>17</sup> So, where there is no market value, the value may be shown by the testimony of persons whose skill and experience enables them to testify to the value.<sup>18</sup> The cost, utility, and use of the property may be taken into consideration.<sup>19</sup>

Where the claim is for nondelivery of goods, the price at which the goods were resold may be considered.<sup>20</sup> In determining the value of a house which has been injured or destroyed, the cost of restoring it to its former condition or of repairing it is an indication of its value.<sup>21</sup>

The promissory note of an individual may have no market value. But proof of the solvency of the maker, or that the note is secured by collateral in whole or in part, furnishes a basis for a fair valuation.

### *Market Price Is Merely Evidence of Value*

The market price of an article is only a means of arriving

<sup>17</sup> *Hovey v. Grant*, 52 N. H. 569, 581. See "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* § 1182.

<sup>18</sup> *World's Columbian Exposition v. Pasteur-Chamberland Filter Co.*, 82 Ill. App. 94; *California Development Co. v. Yuma Valley Union Land & Water Co.*, 9 Ariz. 366, 84 Pac. 88. See "Damages," *Dec. Dig. (Key No.)* § 174; *Cent. Dig.* §§ 462-467; "Evidence," *Dec. Dig. (Key No.)* § 474; *Cent. Dig.* §§ 2217, 2218.

<sup>19</sup> *California Development Co. v. Yuma Valley Union Land & Water Co.*, 9 Ariz. 366, 84 Pac. 88; *JACKSONVILLE, T. & K. W. RY. CO. v. PENINSULAR LAND, TRANSP. & MFG. CO.*, 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65, Cooley, Cas. Damages, 167. See "Damages," *Dec. Dig. (Key No.)* §§ 103-107, 174; *Cent. Dig.* §§ 260-271, 462-467.

<sup>20</sup> *Trigg v. Clay*, 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723. See "Damages," *Dec. Dig. (Key No.)* §§ 103-106, 174; *Cent. Dig.* §§ 260-271, 462-467; "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>21</sup> *McMahon v. City of Dubuque*, 107 Iowa, 62, 77 N. W. 517, 70 Am. St. Rep. 143; *JACKSONVILLE, T. & K. W. RY. CO. v. PENINSULAR LAND, TRANSP. & MFG. CO.*, 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65, Cooley, Cas. Damages, 167; *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270. See "Damages," *Dec. Dig. (Key No.)* §§ 111, 174; *Cent. Dig.* §§ 274-278, 462-467.

at its real value.<sup>22</sup> It is not itself the value of the article, but it is evidence of the value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption.<sup>23</sup> Where an article is destroyed which can be readily replaced by purchase in the market, so as to put the owner in as good a position as he was before, the market price and real value will be the same.<sup>24</sup> In such cases, the market value is said to be the measure of damages, but perhaps it would be more accurate to say that the value of the article was the measure.

### *Stocks, Bonds, and Other Securities*

The value of securities for the payment of money is, *prima facie*, the amount secured.<sup>25</sup> Where the securities have a market value, as in the case of stocks and bonds, that value

<sup>22</sup> Sedg. Dam. § 243. "What a thing will bring in the market at a given time is, perhaps, the measure of its value then, but not the only one." *Trout v. Kennedy*, 47 Pa. 387. See, also, *Foster v. Rodgers*, 27 Ala. 602; *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937. See "Damages," *Dec. Dig. (Key No.)* §§ 103, 188; *Cent. Dig.* §§ 260-264, 511.

<sup>23</sup> *Kountz v. Kirkpatrick*, 72 Pa. 376, 13 Am. Rep. 687. Defendant cannot show that the article was intrinsically of no value, and that the market value was due to a misapprehension on the part of the public. *Smith v. Griffith*, 3 Hill (N. Y.) 333, 38 Am. Dec. 639. But see dissenting opinion of Cowen, J., in this case. See "Damages," *Dec. Dig. (Key No.)* §§ 103, 188; *Cent. Dig.* §§ 260-264, 511.

<sup>24</sup> *Wehle v. Haviland*, 69 N. Y. 448. See "Damages," *Dec. Dig. (Key No.)* §§ 103, 188; *Cent. Dig.* §§ 260-264, 511.

<sup>25</sup> BILLS AND NOTES. *Evans v. Kymer*, 1 Barn. & Adol. 528; *St. John v. O'Connel*, 7 Port. (Ala.) 466; *Ray v. Light*, 34 Ark. 421; *American Exp. Co. v. Parsons*, 44 Ill. 312; *Hersey v. Walsh*, 38 Minn. 521, 38 N. W. 613, 8 Am. St. Rep. 689; *Menkens v. Menkens*, 23 Mo. 252; *Bredow v. Mutual Sav. Inst.*, 28 Mo. 181; *Decker v. Mathews*, 12 N. Y. 313; *Metropolitan El. R. Co. v. Kneeland*, 120 N. Y. 134, 24 N. E. 381, 8 L. R. A. 253, 17 Am. St. Rep. 619; *Ramsey v. Hurley*, 72 Tex. 194, 12 S. W. 56; *Robbins v. Packard*, 31 Vt. 570, 76 Am. Dec. 134. See, also, *Barron v. Mullin*, 21 Minn. 374. The value of a savings bank book is, *prima facie*, the amount of deposits. *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242, 44 N. W. 1096. Of an account, its face value. *Sadler v. Bean*, 37 Iowa, 439. See "*Trover and Conversion*," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* § 266.

for but little, if put into the market to be sold for second hand clothing; and it would be a wholly inadequate and unjust rule of compensation to give plaintiff, in such a case, the value of the clothing thus ascertained. The rule must be the value of the clothing for use by the plaintiff. No other rule would give him a compensation for his damages. This rule must be adopted because such clothing cannot be said to have a market price, and it would not sell for what it was really worth."<sup>84</sup> In such cases, the value is to be properly fixed by considerations of cost and actual worth at the time of the loss, without reference to what they could be sold for in any particular market.<sup>85</sup> The rule applies where the property destroyed cannot be replaced. Thus the measure of damages for the destruction of a family portrait is "the actual value to him who owns it, taking into account its cost, and the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner."<sup>86</sup> Family portraits or heirlooms have a peculiar

<sup>84</sup> *Fairfax v. New York Cent. & H. R. R. Co.*, 73 N. Y. 167, 29 Am. Rep. 119. And see *Sell v. Ward*, 81 Ill. App. 675, where the value of a dress suit was said to be the cost of replacing it. But see *Iler v. Baker*, 83 Mich. 226, 46 N. W. 377, where there was a market for secondhand goods. On loss of baggage, plaintiff is entitled to recover its value for use to him, and not market value. *Simpson v. New York, N. H. & H. R. Co.*, 16 Misc. Rep. 613, 38 N. Y. Supp. 341. See "Damages," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 266; "Trover and Conversion," *Dec. Dig. (Key No.)* §§ 44-47; *Cent. Dig.* §§ 260-272.

<sup>85</sup> *Denver, S. P. & P. R. Co. v. Frame*, 6 Colo. 382, 385; *McMahon v. City of Dubuque*, 107 Iowa, 62, 77 N. W. 517, 70 Am. St. Rep. 143; *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270. See "Damages," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* § 266; "Trover and Conversion," *Dec. Dig. (Key No.)* §§ 44-47; *Cent. Dig.* §§ 260-272.

<sup>86</sup> *Green v. Boston & L. R. Co.*, 128 Mass. 221, 226, 35 Am. Rep. 370; *LOUISVILLE & N. R. CO. v. STEWART*, 78 Miss. 600, 29 South. 394, *Cooley, Cas. Damages*, 173. In *Wade v. Herndi*, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, testimony as to the value of a picture to plaintiff individually as a design was excluded. But in *Bateman v. Ryder*, 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910, it was said that in determining the value of a picture presented to plaintiff by her deceased husband, and other articles, the jury should take into consideration plaintiff's rela-

value to the owner, and may also be difficult or impossible to replace. The recovery of their real value to the owner may be sustained under either branch of the rule. Such articles have no market price, and their value must be determined on other considerations.<sup>37</sup>

### PRETIUM AFFECTIONIS

**80. A pretium affectionis is an imaginary value placed upon a thing by the fancy of its owner, growing out of his attachment for the specific article and its associations.**

**81. A pretium affectionis is never taken as a basis of compensation, for it is not the real value.**

The imaginary or sentimental value sometimes placed upon property by its owner, growing out of his attachment for that specific property, the "pretium affectionis," as it is called, cannot be recovered as compensation for the destruction or conversion of such property.<sup>38</sup> But it would seem that on principle some allowance ought to be made for the personal relation to the article injured or destroyed. In speaking of the action of trover, Prof. Parsons said:<sup>39</sup> "Whether in this or

tion to the articles. See *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808. See "*Trover and Conversion*," *Dec. Dig. (Key No.)* § 44; *Cent. Dig.* § 261.

<sup>37</sup> The actual value to the owner does not mean the pretium affectionis. *Sedg. Dam.* § 251.

<sup>38</sup> *Moseley v. Anderson*, 40 Miss. 49; *LOUISVILLE & N. R. CO. v. STEWART*, 78 Miss. 600, 29 South. 394, Cooley, Cas. Damages, 173; *Klein v. St. Louis Transit Co.*, 117 Mo. App. 691, 93 S. W. 281 (loss of dog); *BARKER v. LEWIS STORAGE & TRANSFER CO.*, 78 Conn. 198, 61 Atl. 363, Cooley, Cas. Damages, 171. The satisfaction and pleasure which the possession of an article gives, like the satisfaction which comes from having a contract respected and performed, is of a nature that the law does not recognize as a subject for compensation. *Sedg. Dam.* § 251. See "*Trover and Conversion*," *Dec. Dig. (Key No.)* § 44; *Cent. Dig.* § 261.

<sup>39</sup> 3 Para. Cont. (8th Ed.) 209.

any action, instead of the actual value, that which the plaintiff puts upon the property, as a gift, perhaps of a dear friend, or for other purely personal reasons, can be recovered, is not, perhaps, certain. We think it quite clear, however, that this *pretium affectionis* cannot be recovered, unless in cases where the conversion or appropriation by the defendant was actually tortious; and in that case we should be disposed to hold that the defendant should be made to pay what he would have been obliged to give if he had bought the article, or, at least, that the damages might be considerably enlarged in such a case, on the principle of exemplary damages." Mr. Field thinks that the jury should determine, under all the circumstances of the case, the amount of damages.<sup>40</sup> In *Suydam v. Jenkins*<sup>41</sup> it was said, obiter: "In most cases the market value of the property is the best criterion of its value to the owner, but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc.; and we do not doubt that the '*pretium affectionis*,' instead of the market price, ought then to be considered by the jury or court in estimating the value." When analyzed, the damage caused by the loss or destruction of property of this nature, consists of two elements: First, the loss of the real property value; second, the grief or mental suffering at the loss of the cherished article. From this we gather what we apprehend to be the true rule, which is that, where property is of such a nature that its loss or destruction, under the circumstances, naturally and proximately causes mental suffering, compensation for such mental suffering may be recovered, in a proper action, in addition to the actual value of the property.<sup>42</sup>

<sup>40</sup> Field, Dam. § 817. See, also, *Whitfield v. Whitfield*, 40 Miss. 352; *Id.*, 44 Miss. 254; *Bicknell v. Colton*, 41 Miss. 368. See "*Damages*," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 220, 533, 534; "*Trover and Conversion*," *Dec. Dig. (Key No.)* § 66; *Cent. Dig.* § 294.

<sup>41</sup> 3 Sandf. (N. Y.) 614, 621.

<sup>42</sup> In *Bateman v. Ryder*, 106 Tenn. 712, 64 S. W. 48, 83 Am. St. Rep. 910, an action for conversion of pictures and other articles which were gifts from plaintiff's deceased husband, and manu-

### TIME AND PLACE OF ASSESSMENT

**82. As a general rule, value should be estimated as of the time and at the place where the owner was deprived of the thing valued.**

As a general rule, value is assessed as of the time and at the place where the owner is deprived of it. This is on the theory that such value is beneficially equal to the property itself.<sup>43</sup> Interest is usually added as compensation for delay in payment. The rule is of general application, wherever the question of value is involved. Thus, the measure of damages, in actions for conversion, is ordinarily the value of the property converted at the time and place of conversion.<sup>44</sup> In con-

scripts of prose and poetry composed by him, an instruction that the jury, in fixing the value of the articles, should determine what would be the fair and reasonable value for the property, "considering plaintiff's relation to the same and the rights of property," was approved. See "*Trover and Conversion*," *Dec. Dig. (Key No.)* §§ 44, 47; *Cent. Dig.* §§ 261-272.

<sup>43</sup>Ewing v. Blount, 20 Ala. 694; Simpson v. Alexander, 35 Kan. 225, 11 Pac. 171; Cutler v. James Goold Co., 43 Hun (N. Y.) 516. See "*Trover and Conversion*," *Dec. Dig. (Key No.)* §§ 44-46; *Cent. Dig.* §§ 260-263; "*Sales*," *Dec. Dig. (Key No.)* §§ 418, 442; *Cent. Dig.* §§ 1172, 1287.

<sup>44</sup>Robinson v. Hartridge, 13 Fla. 501; Spencer v. Vance, 57 Mo. 427; Cole v. Ross, 9 B. Mon. (Ky.) 393, 50 Am. Dec. 517; Spicer v. Waters, 65 Barb. (N. Y.) 227; Briscoe v. McElween, 43 Miss. 556; Dixon v. Caldwell, 15 Ohio St. 412, 86 Am. Dec. 487; New York Guaranty & Indemnity Co. v. Flynn, 65 Barb. (N. Y.) 365; Fowler v. Merrill, 11 How. 375, 13 L. Ed. 736; Watt v. Potter, 2 Mason, 77, Fed. Cas. No. 17,291; Bourne v. Ashley, 1 Lowell, 27, Fed. Cas. No. 1,699; Allen v. Dykers, 3 Hill (N. Y.) 593; Lee v. Mathews, 10 Ala. 683, 44 Am. Dec. 498; Moore v. Aldrich, 25 Tex. Supp. 276; Ripley v. Davis, 15 Mich. 75, 90 Am. Dec. 262; Final v. Backus, 18 Mich. 218; Barry v. Bennett, 7 Metc. (Mass.) 354; Falk v. Fletcher, 18 C. B. (N. S.) 403; Taylor v. Ketchum, 5 Rob. (N. Y.) 507; Selkirk v. Cobb, 13 Gray (Mass.) 313; Agnew v. Johnson, 22 Pa. 471, 62 Am. Dec. 303; Phillips v. Speyers, 49 N. Y. 653; Tyng v. Commercial Warehouse Co., 58 N. Y. 308; Andrews v. Durant, 18 N. Y. 496; Ormsby v. Vermont Copper Min. Co., 56 N. Y. 623; Douglass v. Kraft, 9 Cal. 562; Yater v. Mullen, 24 Ind. 277; Dillenback v. Jerome, 7 Cow. (N. Y.) 298; Dennis v.



demnation proceedings, it is the value at the time and place of taking.<sup>45</sup> In actions for breach of a contract of sale, it is the value at the time and place the goods should have been deliv-

Barber, 6 Serg. & R. (Pa.) 420; Hurd v. Hubbell, 26 Conn. 389; Cook v. Loomis, 26 Conn. 483; Lyon v. Gormley, 53 Pa. 261; Stirling v. Garritee, 18 Md. 468; Carlyon v. Lannan, 4 Nev. 156; Boylan v. Huguet, 8 Nev. 345; Hamer v. Hathaway, 33 Cal. 117; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Riley v. Martin, 35 Ga. 136; Grant v. King, 14 Vt. 367; Crumb v. Oaks, 38 Vt. 566; Kennedy v. Strong, 14 Johns. (N. Y.) 128; Ryburn v. Pryor, 14 Ark. 505; Hatcher v. Pelham, 31 Tex. 201; Jenkins v. McConico, 26 Ala. 213; Robinson v. Barrows, 48 Me. 186; Sanders v. Vance, 7 T. B. Mon. (Ky.) 209, 18 Am. Dec. 167; Clark v. Whitaker, 19 Conn. 319, 48 Am. Dec. 160; Linville v. Black, 5 Dana (Ky.) 177; Commercial & Agricultural Bank v. Jones, 18 Tex. 811; Davis v. Fairclough, 63 Mo. 61; Daniel v. Holland, 4 J. J. Marsh (Ky.) 26; King v. Ham, 6 Allen (Mass.) 298; Lillard v. Whitaker, 3 Bibb (Ky.) 92; Scull v. Briddle, 2 Wash. C. C. 150, Fed. Cas. No. 12,569; Williams v. Crum, 27 Ala. 468; Kennedy v. Whitwell, 4 Pick. (Mass.) 466; Linam v. Reeves, 68 Ala. 89; Jones v. Horn, 51 Ark. 19, 9 S. W. 309, 14 Am. St. Rep. 17; Brasher v. Holtz, 12 Colo. 201, 20 Pac. 616; Ford v. Roberts, 14 Colo. 291, 23 Pac. 322; Skinner v. Pinney, 19 Fla. 42, 45 Am. Rep. 1; Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842; First Nat. Bank of Monmouth v. Strang, 28 Ill. App. 325, 338; Thew v. Miller, 73 Iowa, 742, 36 N. W. 771; Simpson v. Alexander, 35 Kan. 225, 11 Pac. 171; Chamberlain v. Worrell, 38 La. Ann. 347; Hopper v. Haines, 71 Md. 64, 18 Atl. 29, 20 Atl. 159; Forbes v. Boston & L. R. Co., 133 Mass. 154; Jellett v. St. Paul, M. & M. Ry. Co., 30 Minn. 265, 15 N. W. 237; Black v. Robinson, 62 Miss. 68; Nance v. Metcalf, 19 Mo. App. 183; Barlass v. Braash, 27 Neb. 212, 42 N. W. 1028; Beede v. Lamprey, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426; Lake Shore & M. S. Ry. Co. v. Hutchins, 37 Ohio St. 282; Blum v. Merchant, 58 Tex. 400; Miller v. Jannett, 63 Tex. 82; Crampton v. Valido Marble Co., 60 Vt. 291, 15 Atl. 153, 1 L. R. A. 120; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; Ghen v. Rich (D. C.) 8 Fed. 159; Neiswanger v. Squier, 73 Mo. 192; INGRAM v. RANKIN, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762; Cooley, Cas. Damages, 179; Perkins v. Marrs, 15 Colo. 262, 25 Pac. 168; Reid v. Fairbanks, 13 C. B. 692. See "*Trover and Conversion*," *Dec. Dig. (Key No.)* §§ 44-46; *Cent. Dig.* §§ 260-263.

<sup>45</sup> Indiana, B. & W. Ry. Co. v. Allen, 100 Ind. 409; Chaffee's Appeal, 56 Mich. 244, 22 N. W. 871; Alloway v. City of Nashville, 88 Tenn. 511, 13 S. W. 123, 8 L. R. A. 123. See "*Eminent Domain*," *Dec. Dig. (Key No.)* § 124; *Cent. Dig.* §§ 332-344.

ered.<sup>46</sup> On judgment for defendant in replevin, where a return of the property cannot be had, he is entitled to the value as of the time of the taking or as of the time when by the exercise of reasonable diligence he could have replaced the property.<sup>47</sup>

In actions of tort for the loss or destruction of property, the value is to be estimated as of the time of the loss.<sup>48</sup> In actions against a carrier for failure to deliver, the value is to be determined at the place of delivery.<sup>49</sup>

In actions for conversion, where the acts of the defendant have resulted in an increase in the value of the property, nevertheless the value must be determined as of the time and place of the taking, and neither the plaintiff nor the defendant can take advantage of the added value.<sup>50</sup>

<sup>46</sup> See post, p. 356.

<sup>47</sup> *George R. Barse Live Stock Commission Co. v. McKinster*, 10 Okl. 708, 64 Pac. 14. See "*Damages*," *Dec. Dig. (Key No.)* §§ 105, 106; *Cent. Dig.* §§ 266-272.

<sup>48</sup> *Texas & P. Ry. Co. v. Billingsly* (Tex. Civ. App.) 37 S. W. 27; *San Antonio St. Ry. Co. v. Wray* (Tex. Civ. App.) 37 S. W. 461; *Watson v. Loughran*, 112 Ga. 837, 38 S. E. 82; *Matthews v. Missouri Pac. Ry. Co.*, 142 Mo. 645, 44 S. W. 802. See "*Damages*," *Dec. Dig. (Key No.)* §§ 105, 106; *Cent. Dig.* §§ 266-272.

<sup>49</sup> *McGregor v. Kilgore*, 6 Ohio, 359, 27 Am. Dec. 260. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 94, 135; *Cent. Dig.* §§ 389-391, 600.

<sup>50</sup> *Martin v. Porter*, 5 Mees. & W. 351; *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426; *White v. Yawkey*, 108 Ala. 270, 19 South. 360, 32 L. R. A. 199, 54 Am. St. Rep. 159; *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 25 L. R. A. 813, 44 Am. St. Rep. 439; *Glaspy v. Cabot*, 135 Mass. 435. But see *Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474; *E. E. Bolles Wooden Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230 (where the wrongdoing was intentional). See "*Trover and Conversion*," *Dec. Dig. (Key No.)* §§ 44-46, 52; *Cent. Dig.* §§ 269-271.

**SAME—HIGHEST INTERMEDIATE VALUE**

83. In many, but not all, jurisdictions, where one has been wrongfully deprived of property of a fluctuating value, the highest value intermediate the wrong and the end of the trial, is the measure of damages, provided the action is brought within a reasonable time.
84. The better opinion seems to be that the highest price reached within a reasonable time after plaintiff had notice of the conversion within which he could repurchase in the market is the measure of damages.

**EXCEPTIONS—The rule is sometimes confined to stock transactions.**

In actions for conversion, an exception to the rule that the measure of damages is the value of the property, with interest from the time of conversion, has been recognized where the property is of a fluctuating value.<sup>51</sup> In such cases, in many jurisdictions, the plaintiff is entitled to recover the highest value the property has reached at any time intermediate the conversion and the end of the trial, provided the action be brought within a reasonable time. This exception has given rise to great conflict in the decisions. It proceeds upon the principle that, where an owner is wrongfully deprived of his property, he and not the wrongdoer should have the benefit of a subsequent increase in value, and that to hold otherwise would practically permit one to force a sale to himself, at his own price, by selecting a period of great depression to convert the property, and, by having the benefit of a subsequent increase in value, to receive large profits from his own wrong.<sup>52</sup>

<sup>51</sup> The qualification that the property be of a fluctuating value would seem to be unimportant, as it is doubtful if there is any property entirely stable in value; and, besides, if the property did not fluctuate, it would be immaterial at what time the value was taken. Field, Dam. § 799.

<sup>52</sup> Suth. Dam. § 1119; Field, Dam. § 812.

These reasons are equally applicable in all cases where one is wrongfully deprived of his property, and the rule has accordingly been applied in actions of detinue<sup>53</sup> and replevin,<sup>54</sup> in actions for refusal to transfer or deliver corporate stock,<sup>55</sup> and in actions for failure to deliver goods sold, the price of which had been paid in advance.<sup>56</sup> The rule of damage should not depend on the form of action; and, indeed, the Codes have very generally abolished all artificial distinctions.

### *Objections to the Doctrine*

A just indemnity for all losses which are the natural, proximate, and certain results of the wrong complained of, is the rule of compensation, whether the action be in contract or in tort. Testing the rule of highest intermediate value by this principle, several objections to its adoption as a uniform rule of damages become apparent. For instance, on what principle can the plaintiff be said to have lost the highest intermediate value, when the property was not intended for sale, but for use, or even, when the property was intended for sale, if it would have been sold in the course of business before the advance occurred?<sup>57</sup> It is true that in some cases the plaintiff may have been injured to the extent of the highest value of the property at any time before the trial; but, perhaps in

<sup>53</sup> *Johnson v. Marshall*, 34 Ala. 522. See "*Detinue*," *Dec. Dig.* (Key No.) § 19; *Cent. Dig.* §§ 37-40.

<sup>54</sup> In *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614, it was held that the damages recoverable in replevin were the same as in trover, but that in neither case was the rule of highest intermediate value of invariable application. See "*Replevin*," *Dec. Dig.* (Key No.) § 103; *Cent. Dig.* §§ 405, 406; "*Trover and Conversion*," *Dec. Dig.* (Key No.) §§ 44-49; *Cent. Dig.* §§ 262-264.

<sup>55</sup> *Bank of Montgomery Co. v. Reese*, 26 Pa. 143; *Musgrave v. Beckendorff*, 53 Pa. 310; *Shepherd v. Johnson*, 2 East, 211. See "*Corporations*," *Dec. Dig.* (Key No.) § 121; *Cent. Dig.* § 505; "*Damages*," *Dec. Dig.* (Key No.) § 126; *Cent. Dig.* § 349.

<sup>56</sup> *Gilman v. Andrews*, 66 Iowa, 116, 23 N. W. 291; *Harrison v. Charlton*, 37 Iowa, 134; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692; *Gregg v. Fitzhugh*, 36 Tex. 127; *Kent v. Ginter*, 23 Ind. 1. See "*Sales*," *Dec. Dig.* (Key No.) §§ 418, 442; *Cent. Dig.* §§ 1175-1179, 1287.

<sup>57</sup> *Sedg. Dam.* (8th Ed.) § 509, note, on page 110.

the majority of cases, this would not be so. In the case of raw material, perishable property, or property intended for consumption, the probabilities are that it would have been disposed of within a short time, and no benefit would have been realized by the subsequent increase in value.<sup>58</sup> Again, the presumption that the owner would have disposed of his property when it reached the highest figure would not accord with fact once in a hundred times.<sup>59</sup>

The objections to the doctrine have been ably stated by Duer, J.:<sup>60</sup> "When the evidence justifies the conclusion that a higher price would have been obtained by the owner had he kept the possession, or has been obtained by the wrongdoer, we have admitted and shown that it ought to be included in the estimate of damages—in the first case, as a portion of the indemnity to which the owner is entitled, and, in the second, as a profit which the wrongdoer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is proved that it would not have been obtained by the owner, and has not been obtained by the wrongdoer \* \* \* Our objections to considering an intermediate higher value as an invariable rule of damages have already been stated, and need not be repeated. It is perfectly just, when the enhanced price has been realized by the wrongdoer, or it is reasonable to believe would have been realized by the owner, had he retained the possession; but in all other cases damages founded upon such an estimate are either purely speculative or plainly vindictive. They are conjectural and speculative when it is barely possible that the owner, had he retained the possession, would

<sup>58</sup> *Pinkerton v. Manchester & L. R. R.* 42 N. H. 424, 462. See "*Sales*," *Dec. Dig. (Key No.)* §§ 418, 442; *Cent. Dig.* §§ 1175-1179, 1287; "*Trover and Conversion*," *Dec. Dig. (Key No.)* §§ 44-46; *Cent. Dig.* §§ 260-263.

<sup>59</sup> *WRIGHT v. BANK OF THE METROPOLIS*, 110 N. Y. 237, 246, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356, Cooley, *Cas. Damages*, 174. See "*Damages*," *Dec. Dig. (Key No.)* §§ 104-106; *Cent. Dig.* §§ 260-264; "*Trover and Conversion*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 264.

<sup>60</sup> *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614, 624, 629.

have derived a benefit from the higher value. They are vindictive when it is certain that no such benefit could have resulted to him."

If the rule limiting damages to the value of the property at the time of conversion, with interest thereon, is to be departed from in any case, and a higher value allowed, it would seem, on principle, that it should be done only when it is proved, and not merely presumed, that the higher value would actually have been realized.<sup>61</sup>

The rule of highest intermediate value has not met with universal favor. In many jurisdictions it is repudiated altogether, and in others its application is greatly limited. Sometimes it is applied only to stock transactions,<sup>62</sup> and sometimes

<sup>61</sup> Sedg. Dam. (8th Ed.) § 509, note; *Meshke v. Van Doren*, 16 Wis. 319; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614, 629; *Symes v. Oliver*, 13 Mich. 9; *Ewart v. Kerr*, 2 McM. (S. C.) 141; *De Clerq v. Mungin*, 46 Ill. 112; *INGRAM v. RANKIN*, 47 Wis. 406, 420, 2 N. W. 755, *Cooley, Cas. Damages*, 179. Where defendant is in possession of the property at the time of trial, there is no injustice in compelling him to pay its value at that time. *Suth. Dam.* § 1125; *INGRAM v. RANKIN*, 47 Wis. 420, 2 N. W. 755, 32 Am. Rep. 762, *Cooley, Cas. Damages*, 179. See "*Damages*," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353; "*Trover and Conversion*," *Dec. Dig. (Key No.)* §§ 44-49; *Cent. Dig.* §§ 260-264.

<sup>62</sup> *Field, Dam.* §§ 808, 812. *Bank of Montgomery Co. v. Reese*, 26 Pa. 143. In *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614, 633, the distinction between stocks and other personal property was justified on the ground—"First, that as chancery may decree a specific execution of a contract for replacing stock, and the defendant, when such a decree is made, to enable himself to perform it, must of necessity purchase the stock at its then market price, he can have no right to complain when he is compelled to pay the same sum as damages, by the judgment of a court of law; and, second, that as stock is usually held, not for sale, but as a permanent investment, it is a reasonable presumption that, had it not been replaced at the stipulated time, whatever it might be is no more than an indemnity." But, as Mr. Sedgwick has pointed out (2 Sedg. Dam. [8th Ed.] p. 110, note), though these are the reasons commonly assigned for the distinction, it is very doubtful whether a decree can be had for specific performance of such an agreement, damages being an adequate remedy for the breach. *Story, Eq. Jur.* §§ 717, 717a; *Buxton v. Lister*, 3 Atk. 383; *Sullivan v. Tuck*, 1 Md. Ch. 50. And as to stocks

it is applied to any transaction in merchandise of a fluctuating value. It would be too great a task to review all the various and conflicting opinions that have been delivered on this subject, but we shall notice a few as illustrations of the different views taken.

#### *Applications of the Rule*

In New York, in an early case,<sup>63</sup> the rule was adopted in its broadest terms, no distinction being made between stocks and other personal property. The action was for the conversion of stock. The trial was a protracted one, and during its continuance the value of the stock increased over \$2,000, which the plaintiff was allowed to recover. The rule adopted was that, where there is any uncertainty or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff is entitled to recover the highest market value of the property, at any time intermediate the conversion and the end of the trial, provided the action is brought within a reasonable time. In a later case<sup>64</sup> a different rule was sanctioned. The action was for the conversion of wheat, and the measure of damages adopted was the highest value between the time of

of a fluctuating value, it is quite as probable that they were bought for speculation as that they were bought for investment. Mr. Field also comes to the conclusion that there is no sound distinction in this regard between stocks and other personal property. Field, Dam. § 813. See "*Corporations*," Dec. Dig. (Key No.) § 121; Cent. Dig. § 505; "*Damages*," Dec. Dig. (Key No.) § 126; Cent. Dig. §§ 344-349; "*Trover and Conversion*," Dec. Dig. (Key No.) § 49; Cent. Dig. § 264.

<sup>63</sup> Romaine v. Van Allen, 26 N. Y. 309. See, also, Cortelyou v. Lansing, 2 Caines, Cas. 200; West v. Wentworth, 3 Cow. (N. Y.) 82; Wilson v. Mathews, 24 Barb. (N. Y.) 295. And see Clark v. Pinney, 7 Cow. (N. Y.) 681, where the rule was applied to a sale of goods. In Brass v. Worth, 40 Barb. (N. Y.) 648, a rule was declared more nearly consistent with the later than the earlier authorities. See "*Corporations*," Dec. Dig. (Key No.) § 121; Cent. Dig. § 505; "*Damages*," Dec. Dig. (Key No.) § 126; Cent. Dig. §§ 344-353.

<sup>64</sup> Scott v. Rogers, 31 N. Y. 676, 682. See "*Damages*," Dec. Dig. (Key No.) § 126; Cent. Dig. §§ 344-353; "*Trover and Conversion*," Dec. Dig. (Key No.) § 49; Cent. Dig. §§ 231, 264.

conversion and a reasonable time thereafter in which to commence the action. The court said:

"In the absence of any definite means for ascertaining the period when the owner of the property would have disposed of it, we are necessarily more or less in the dark as to the amount of injury which he has sustained by the illegal act of the defendants, and are driven to resort more or less to conjecture, or to fix upon some arbitrary period for determining the price of the property. It is obviously a rule of doubtful justice to give to the plaintiff the whole period until the statute of limitations would attach for the commencement of this action, and the whole period intervening between the conversion and the trial to select his standard of price, without ever having given notice of his intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications upon this question, would seem to be to allow to the plaintiff some reasonable period, within the statute of limitations, for fixing the price of the property, provided he notifies the adverse party at the time of such act on his part, but never to allow him unlimited liberty of selection as to the price of which he will avail himself at the trial of the cause. If he does not make and notify his election of time, then to fix the time by the day of commencing the action, provided the action be commenced within a reasonable time after the conversion. This is an election to hold the defendant liable for the conversion, and, in effect, to treat the property as his. \* \* \* This seems to me the just and equitable rule. It is not, however, perhaps, quite the rule which has obtained in the law for settling the question of damages in the case of an illegal conversion of property. \* \* \* I think the rule of damages applicable to cases of this description is reasonably well settled to be as liberal as this in favor of the plaintiff, to wit, to allow to the plaintiff the highest price for the property prevailing between the time of conversion and a reasonable time afterwards for the commencement of the action. Some of the cases carry the period up to the time of trial of a suit commenced within a reasonable time; and, as between these two periods—the time of commencing the suit,



and the time of trial—the rule is somewhat fluctuating. What this reasonable time shall be has never been definitely settled, and may, perhaps, fluctuate to some extent, according to the circumstances of the particular case.”

Though the rule sanctioned in this case differed materially from that adopted in the earlier case, the latter has not been regarded as overruled, but, on the contrary, has been followed in later cases.<sup>65</sup> These cases have been overruled in so far as stock transactions are concerned, on the ground that the loss of the highest intermediate value is not a natural, proximate, or certain result of the wrong. In *Baker v. Drake*<sup>66</sup> the court said: “This enormous amount of profit, given under the name of damages, could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff not only would have supplied the necessary margin and caused the stock to be carried through all its fluctuation, until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience.” The court held that, in this class of cases, it was the owner’s duty to avoid further loss by going into the market and replacing the stock, and that the market price, within a reasonable time after notice of the conversion in which to do so, was the measure of damages. This rule was reaffirmed in a later case,<sup>67</sup> where it was said: “It

<sup>65</sup> *Burt v. Dutcher*, 34 N. Y. 493; *Markham v. Jaudon*, 41 N. Y. 235; *Lobdell v. Stowell*, 51 N. Y. 70. See, also, *Morgan v. Gregg*, 46 Barb. (N. Y.) 33; *Lawrence v. Maxwell*, 6 Lans. (N. Y.) 469; *Nauman v. Cadwell*, 2 Sweeney (N. Y.) 212. In *Matthews v. Coe*, 49 N. Y. 87, the court distinguished earlier cases, but intimated that the rule was not so firmly settled as to be beyond the reach of review. See “*Damages*,” *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344–353; “*Trover and Conversion*,” *Dec. Dig. (Key No.)* §§ 44–46; *Cent. Dig.* §§ 260–264.

<sup>66</sup> 53 N. Y. 211, 215, 13 Am. Rep. 507.

<sup>67</sup> *WRIGHT v. BANK OF THE METROPOLIS*, 110 N. Y. 237, 249, 18 N. E. 79, 1 L. R. A. 286, 6 Am. St. Rep. 356, *Cooley*, Cas. Damages, 174. See, also, *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Gruman v. Smith*, 81 N. Y. 25; *Colt v.*

is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff had learned of the conversion of his stock within which he could go in the market and repurchase it." It was held in this case to be immaterial whether the stock was owned absolutely, or simply carried on margins—a distinction suggested in the earlier case.

The supreme court of the United States has adopted the rule of the New York court in regard to stock transactions.<sup>68</sup> "It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists, not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time

Owens, 90 N. Y. 368. To the same effect, see *In re Swift* (D. C.) 114 Fed. 947; *George R. Barse Live Stock Commission Co. v. McKinster*, 10 Okl. 708, 64 Pac. 14. See "*Corporations*," *Dec. Dig.* (Key No.) § 121; *Cent. Dig.* § 505; "*Damages*," *Dec. Dig.* (Key No.) § 126; *Cent. Dig.* § 349.

<sup>68</sup> *Galigher v. Jones*, 129 U. S. 193, 200, 9 Sup. Ct. 335, 32 L. Ed. 658. See "*Corporations*," *Dec. Dig.* (Key No.) § 121; *Cent. Dig.* § 505; "*Damages*," *Dec. Dig.* (Key No.) § 126; *Cent. Dig.* § 349.

fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust. The rule of highest intermediate value, as applied to stock transactions, has been adopted in England and in several of the states in this country, while in some others it has not obtained. \* \* \* On the whole, it seems to us that the New York rule, as finally settled by the court of appeals, has the most reasons in its favor, and we adopt it as a correct view of the law."

In Pennsylvania the rule of highest intermediate value was adopted with reference to stock transactions,<sup>69</sup> but not in regard to personal property in general.<sup>70</sup> The rule was afterwards declared applicable only where the defendant was under a contract or trust duty to deliver stock,<sup>71</sup> and still later it was held that the rule did not apply to actions of trover nor to ordinary stock contracts, but only to cases in which there was a trust relation between the parties, and in cases where justice cannot be reached by the ordinary measure of damages.<sup>72</sup>

In Alabama, it is discretionary with the jury to allow such value as they deem proper between the highest value reached before trial and the value at the time of conversion.<sup>73</sup> "This

<sup>69</sup> *Bank of Montgomery Co. v. Reese*, 26 Pa. 143; *Musgrave v. Beckendorff*, 53 Pa. 310. See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* § 349.

<sup>70</sup> *Smethurst v. Woolston*, 5 Watts & S. 106 (nondelivery of chattels); *Neiler v. Kelley*, 69 Pa. 403 (conversion of pledged stock). See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353.

<sup>71</sup> *Neiler v. Kelley*, 69 Pa. 403; *Work v. Bennett*, 70 Pa. 484; *Appeal of Phillips*, 68 Pa. 130; *Leacock v. Poxson*, 208 Pa. 602, 57 Atl. 1097. See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353.

<sup>72</sup> *Huntington & B. T. M. R. & Coal Co. v. English*, 86 Pa. 247; *North v. Phillips*, 89 Pa. 250; *Wagner v. Peterson*, 83 Pa. 238. The trust relation would probably be deemed to exist between a stock broker and his client. *Galigher v. Jones*, 129 U. S. 193, 201, 9 Sup. Ct. 335, 32 L. Ed. 658. See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353.

<sup>73</sup> *Loeb v. Flash*, 65 Ala. 526; *Posey v. Gamble*, 148 Ala. 660, 41 South. 416; *Street v. Nelson*, 67 Ala. 504; *Renfro v. Hughes*, 69 Ala. 581. See, also, *Tatum v. Manning*, 9 Ala. 144; *Ewing v.*

discretion of the jury in selecting the exact period of valuation should be exercised in such a manner as to prevent the defendant from reaping a pecuniary profit through his wrongful act, and at the same time, in proper cases, to permit the special equities or hardships of the particular case so to operate in the mitigation of damages, as exact justice may require."<sup>74</sup>

In South Carolina, also, the jury may in its discretion allow the highest value between the time of the conversion and the time of trial, or may limit the damages to the value at the time of conversion.<sup>75</sup>

In Georgia, Montana, and North Dakota, by the provisions of the codes of those states, the measure of damages may be either the value at the time of the conversion or the highest market value between the conversion and the trial.<sup>76</sup>

In Mississippi, the measure of damages is the value at the

Blount, 20 Ala. 694; Jenkins v. McConico, 26 Ala. 213; Johnson v. Marshall, 34 Ala. 522. Formerly, in case of nondelivery of goods sold, the rule was not applied. Rose v. Bozeman, 41 Ala. 678. See "Damages," Dec. Dig. (Key No.) § 126; Cent. Dig. §§ 344-353; "Trover and Conversion," Dec. Dig. (Key No.) §§ 44-46; Cent. Dig. §§ 260-264.

"Burks v. Hubbard, 69 Ala. 379, 384. See "Damages," Dec. Dig. (Key No.) § 126; Cent. Dig. §§ 344-353; "Trover and Conversion," Dec. Dig. (Key No.) §§ 44-46; Cent. Dig. §§ 260-264.

"Gregg v. Bank of Columbia, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633. See "Damages," Dec. Dig. (Key No.) § 126; Cent. Dig. §§ 344-353; "Trover and Conversion," Dec. Dig. (Key No.) §§ 44-46; Cent. Dig. §§ 260-264.

"George D. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Oxford v. Ellis, 117 Ga. 817, 45 S. E. 67; Thornton-Thomas Mercantile Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10 (holding that plaintiff must elect which measure of damages he will claim); First Nat. Bank of Fargo v. Minneapolis & N. Elevator Co., 8 N. D. 430, 79 N. W. 874; Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446; First Nat. Bank of Fargo v. Red River Valley Nat. Bank, 9 N. D. 319, 83 N. W. 221, where plaintiff was allowed to recover the highest intermediate value of wheat, though by reason of a "corner" the price of wheat had been unnaturally high. See "Damages," Dec. Dig. (Key No.) § 126; Cent. Dig. §§ 344-353; "Trover and Conversion," Dec. Dig. (Key No.) §§ 44-46; Cent. Dig. §§ 344-353.

time of conversion, with interest, except in the following classes of cases: (1) Where the original act was wrongful; (2) where it was bona fide, but the defendant subsequently disposed of the property wrongfully and with knowledge of the plaintiff's claim; (3) where the taking and disposition of the property were both in good faith, but the defendant seeks to retain the excess of the proceeds of the sale over the market value at the time of the conversion "as a speculation"; (4) where the property has some peculiar value to plaintiff, and is willfully taken or withheld by the defendant.<sup>77</sup>

The rule of higher intermediate value has been adopted, with more or less variations, in other jurisdictions,<sup>78</sup> but in perhaps the majority of them it has been denied.<sup>79</sup> In all

<sup>77</sup> *Whitfield v. Whitfield*, 40 Miss. 352, 367. See, also, *Bickell v. Colton*, 41 Miss. 368. See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353; "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1175-1184.

<sup>78</sup> *Cannon v. Folsom*, 2 Iowa, 101, 63 Am. Dec. 474; *Harrison v. Charlton*, 37 Iowa, 134; *Gilman v. Andrews*, 66 Iowa, 116, 23 N. W. 291; *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189; *Gregg v. Fitzhugh*, 36 Tex. 127; *Ranson v. Barton*, 4 Tex. 289; *Brasher v. Davidson*, 31 Tex. 190, 98 Am. Dec. 525; *Dimock v. United States Nat. Bank*, 65 N. J. Law, 296, 25 Atl. 926, 39 Am. St. Rep. 643; *Kid v. Mitchell*, 1 Nott & McC. 334, 9 Am. Dec. 702. In Iowa the rule is that on the conversion of corporate shares the owner is entitled to recover the highest value between the conversion and a reasonable time for replacing it, if the purchase price has not been paid, or, if the purchase price has been paid, then the highest value between the conversion and the time of the bringing of the action, provided the bringing of the action is not unreasonably delayed. *Doyle v. Burns*, 123 Iowa, 488, 99 N. W. 195. See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353; "Trove and Conversion," *Dec. Dig. (Key No.)* §§ 44-46; *Cent. Dig.* §§ 260-264; "Sales," *Dec. Dig. (Key No.)* §§ 418, 442; *Cent. Dig.* §§ 1175-1179, 1287.

<sup>79</sup> *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; *Gray v. Portland Bank, President, etc., of*, 3 Mass. 364; *Hussey v. President, etc., of Mfgs. & Mechanics' Bank*, 10 Pick. (Mass.) 415; *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235 (but see *Maynard v. Pease*, 99 Mass. 555); *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. 842; *Galena & S. W. R. Co. v. Ennor*, 123 Ill. 505, 14 N. E. 673; *Smith v. Dunlap*, 12 Ill. 184; *Cushman v. Hayes*, 46 Ill. 145; *Bates v.*

jurisdictions the action must be brought within a reasonable time, or the rule does not apply.<sup>80</sup> The application of the rule must, of course, be limited to commodities that are really fluctuating in value.<sup>81</sup>

### MEDIUM OF PAYMENT—LEGAL TENDERS

**85. Damages must be assessed and paid in domestic money.**

**86. Money means coin, in the absence of statutes declaring something else a legal tender.**

Damages must be assessed and paid in money,<sup>82</sup> and, in the

Stansell, 19 Mich. 91; Jackson v. Evans, 44 Mich. 510, 7 N. W. 79; INGRAM v. RANKIN, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762, Cooley, Cas. Damages, 179; Noonan v. Ilsley, 17 Wis. 314, 84 Am. Dec. 742; White v. Salisbury, 33 Mo. 150; Walker v. Borland, 21 Mo. 289; Pinkerton v. Railroad Co., 43 N. H. 424, 463; Enders v. Board of Public Works, 1 Grat. (Va.) 364; Third Nat. Bank of Baltimore v. Boyd, 44 Md. 47, 23 Am. Rep. 35; Baltimore City Pass. Ry. Co. v. Sewell, 35 Md. 238, 6 Am. Rep. 402; Andrews v. Clark, 72 Md. 396, 20 Atl. 429; Fosdick v. Greene, 27 Ohio St. 484, 23 Am. Rep. 328; Arrington v. Wilmington & W. R. Co., 51 N. C. 68, 72 Am. Dec. 559 (but see Boylston Ins. Co. v. Davis, 70 N. C. 485). See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353.

<sup>80</sup> Clark v. Pinney, 7 Cow. (N. Y.) 681; Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195; Civ. Code, Mont. § 4333; Thornton-Thomas Mercantile Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10; First Nat. Bank of Fargo v. Minneapolis & N. Elevator Co., 8 N. D. 430, 79 N. W. 874 (holding a delay of 11 months unreasonable); Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446; First Nat. Bank v. Red River Valley Nat. Bank, 9 N. D. 319, 83 N. W. 231. If there is an unreasonable delay, the measure of damages is the value at the time of the injury. Heilbronner v. Douglass, 45 Tex. 402. See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353; "Trover and Conversion," *Dec. Dig. (Key No.)* §§ 44-46; *Cent. Dig.* §§ 260-264.

<sup>81</sup> Wehle v. Haviland, 69 N. Y. 448. See "Trover and Conversion," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* § 264.

<sup>82</sup> Sedg. Dam. § 286.

absence of statute, money means coin.<sup>83</sup> It would be a simple matter, ordinarily, to estimate the amount due on a contract for the payment of money, if there were but a single standard of money, and that standard remained unchanged between the time of contract and the date of payment. But where there are two or more standards of different intrinsic value, or where the standard has been changed, difficult problems may arise.

By the legal tender acts,<sup>84</sup> it was declared that certain treasury notes of the United States should be a legal tender in payment of debts. The effect of these acts was to establish a new and additional standard of money, nominally, but not intrinsically, equal to the old. It was decided that the acts were constitutional, and applied to antecedent as well as subsequent contracts.<sup>85</sup> Many exceedingly important and difficult questions thereupon arose, such as the right of parties to stipulate for payment in gold, and the form of judgment on such a contract.

The result of the decisions under the legal tender acts has been admirably summed up by Mr. Field as follows:<sup>86</sup> "(1) That, where a contract provides for the payment of money within the United States and contains no stipulation as to the kind of money, it will be satisfied by a tender of the nominal amount in legal tender notes; and the measure of damages

<sup>83</sup> Field, *Dam.* § 216; *Gwin v. Breedlove*, 2 How. 39, 11 L. Ed. 167. See "Payment," *Dec. Dig. (Key No.)* §§ 9, 10; *Cent. Dig.* §§ 38-64.

<sup>84</sup> *Rev. St. U. S.* 1875, p. 712, c. 39, § 3589; 12 Stat. 345; *Id.* 709; *Id.* 218.

<sup>85</sup> *Knox v. Lee*; *Parker v. Davis* (legal tender cases) 12 Wall. 457, 20 L. Ed. 287; *Dooley v. Smith*, 13 Wall. 604, 20 L. Ed. 547; *Juilliard v. Greenman*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204. These cases overruled *Hepburn v. Griswold*, 8 Wall. 603, 19 L. Ed. 513, which held the acts unconstitutional as to antecedent contracts. The state courts generally sustain the acts. See *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400; *Meyer v. Roosevelt*, 27 How. Prac. (N. Y.) 97; *Lawis v. Railroad Co.*, 6 Am. Law Reg. (N. S.) 703; *Lick v. Faulkner*, 25 Cal. 404; *Van Husean v. Kanouse*, 13 Mich. 303; *Wood v. Bullens*, 6 Allen (Mass.) 516. See "Payment," *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* § 39.

<sup>86</sup> Field, *Dam.* 222.

in an action on such a contract is the nominal amount due in legal tender notes.<sup>87</sup> (2) That, if gold or silver coin is applied in payment of such a claim, in the absence of a special contract in relation thereto, it will be applied at its nominal value; and it satisfies to the same extent, and no more, as a payment of an equal nominal amount in legal tender notes.<sup>88</sup> (3) That, where a contract provides specifically for payment in gold or silver coin, the coin must be paid,<sup>89</sup> and damages

<sup>87</sup> Sedg. Dam. § 269. Where gold is deposited in bank, payment may be made in legal tender paper. *Aurentz v. Porter*, 56 Pa. 115. See, also, *Thompson v. Riggs*, 5 Wall. 663, 18 L. Ed. 704, and *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. Ed. 785. A judgment rendered before the passage of the act is satisfied by payment in legal tender paper (*Bowen v. Clark*, 46 Ind. 405), though it was for a debt created by the loan of gold (*McInhill v. Odell*, 62 Ill. 169). See, also, *Belloc v. Davis*, 38 Cal. 242; *Longworth v. Mitchell*, 26 Ohio St. 334. See "Payment," *Dec. Dig. (Key No.)* §§ 9, 10; *Cent. Dig.* §§ 38-61.

<sup>88</sup> *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Stanwood v. Flagg*, 98 Mass. 124; *Stark v. Coffin*, 105 Mass. 328. See "Payment," *Dec. Dig. (Key No.)* §§ 9, 10; *Cent. Dig.* §§ 38-61.

<sup>89</sup> *Bronson v. Rodes*, 7 Wall. 229, 19 L. Ed. 141. In *Butler v. Horwitz*, 7 Wall. 258, 260, *Chase, C. J.*, said: "A contract to pay a certain sum in gold and silver coin is, in substance and legal effect, a contract to deliver a certain weight of gold and silver of a certain fineness, to be ascertained by count. Damages for nonperformance of such a contract may be recovered at law as for nonperformance of a contract to deliver bullion or other commodity. But whether the contract be for the delivery or payment of coin, or bullion, or other property, damages for nonperformance must be assessed in lawful money—that is to say, in money declared to be legal tender in payment. \* \* \* We find two descriptions of lawful money in use under acts of congress, in either of which damages for nonperformance of contracts, whether made before or since the passage of the currency acts, may be properly assessed, in the absence of any different understanding or agreement between parties. But the obvious intent, in contracts for the payment or delivery of coin or bullion, to provide against fluctuations in the medium of payment, warrants the inference that it was the understanding of the parties that such contracts should be satisfied, whether before or after judgment, only by tender of coin, which the absence of any express stipulation as to description, in contracts for payment in money generally, warrants the apposite inference of an un-



for the breach of such a contract should be assessed in coin for the nominal amount; and judgment should be rendered for the coin stipulated, and not for its equivalent value in treasury legal tender notes; and such a judgment can only be satisfied by specie payment."<sup>90</sup>

### *Foreign Currency*

Foreign currency is considered merely as a commodity, and, accordingly, wherever such currency is involved, judgment is given for its value in domestic money.<sup>91</sup> As the value is

derstanding between parties that such contracts may be satisfied, before or after judgment, by the tender of any lawful money. \* \* \* When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold or silver, damages should be assessed and judgment rendered accordingly." See "*Payment*," *Dec. Dig. (Key No.)* §§ 9-12; *Cent. Dig.* §§ 38-61.

<sup>90</sup>The *Emily Souder*, 17 Wall. 666, 21 L. Ed. 683; *Chisholm v. Arrington*, 43 Ala. 610; *Bowen v. Darby*, 14 Fla. 202; *Stringer v. Coombs*, 62 Me. 160, 16 Am. Rep. 414; *Chesapeake Bank v. Swain*, 29 Md. 483; *Independent Ins. Co. v. Thomas*, 104 Mass. 192; *Warren v. Franklin Ins. Co.*, 104 Mass. 518; *Stark v. Coffin*, 105 Mass. 328; *Currier v. Davis*, 111 Mass. 480; *Whitney v. Thatcher*, 117 Mass. 523; *Chrysler v. Renois*, 43 N. Y. 209; *Phillips v. Speyers*, 49 N. Y. 653; *Quinn v. Lloyd*, 1 Sweeney (N. Y.) 253; *Phillips v. Dugan*, 21 Ohio St. 466, 8 Am. Rep. 78; *Bridges v. Reynolds*, 40 Tex. 205; *Johnson v. Stallcup*, 41 Tex. 529. In some states, gold was treated like ordinary merchandise, and its value was assessed in paper. *Appeal of Baker*, 59 Pa. 313; *Frank v. Colhoun*, 59 Pa. 381; *Dunn v. Barnes*, 73 N. C. 273; *Wills v. Allison*, 4 Heisk. (Tenn.) 385; *Bond v. Greenwald*, 4 Heisk. (Tenn.) 453. In *Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333, it was held that, in actions of tort for the loss of gold, judgment should be entered in gold coin, and not its then equivalent in paper. *Contra*, *Cushing v. Wells*, 98 Mass. 550. See "*Payment*," *Dec. Dig. (Key No.)* §§ 9-12; *Cent. Dig.* §§ 38-61.

<sup>91</sup>*Pollock v. Colglazure*, Ky. Dec. 2; *Sheehan v. Dalrymple*, 19 Mich. 239; *Fabbri v. Kalbfleisch*, 52 N. Y. 28; *Colton v. Dunham*, 2 Paige (N. Y.) 267; *Mather v. Kinike*, 51 Pa. St. 425; *Christ Church Hospital v. Fuechsel*, 54 Pa. 71; *Nova Scotia Telegraph Co. v. American Telegraph Co.*, 4 Am. Law Reg. (N. S.) 365. In *Robinson v. Hall*, 28 How. Prac. (N. Y.) 342, and *Hawes v. Woolcock*, 26 Wis. 629, it was held that the value of foreign currency should be estimated at the date of the trial or judgment, instead of at the date of performance. But this cannot be

to be estimated as of the place of performance, the rate of exchange must be added or subtracted.<sup>92</sup>

### *Mercantile Securities*

A contract payable in mercantile securities is in effect a contract to deliver commodities; and the damages for a breach is the actual, and not the face value of the securities.<sup>93</sup>

### *Alternative Medium*

Where the parties stipulate for an alternative medium of

sound if foreign currency is regarded as a commodity. But a contract which is a money contract where entered into is a money contract everywhere. To this extent foreign currency differs from a mere chattel or commodity. Such a contract may be declared on in debt, or in assumpsit, for money had and received, money lent, etc. *Suth. Dam.* § 205. A contract for the payment of foreign gold is merely a contract for a commodity, and judgment thereon need not be entered in gold. It is not a contract for the payment of gold dollars. *Sedg. Dam.* § 274; *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84; *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150; *Benness v. Clemens*, 58 Pa. 24. *Contra*, *Stringer v. Coombs*, 62 Me. 160, 16 Am. Rep. 414. See "*Payment*," *Dec. Dig. (Key No.)* §§ 9-12; *Cent. Dig.* §§ 38-61.

<sup>92</sup> *Story*, *Confl. Laws*, §§ 302, 308; *Sedg. Dam.* § 275; *Lanusse v. Barker*, 3 Wheat. 101, 147, 4 L. Ed. 343; *Woodhull v. Wagner*, *Baldw.* 296, 302, *Fed. Cas. No.* 17,975; *Grant v. Healey*, 3 Sumn. 523, *Fed. Cas. No.* 5,696; *Smith v. Shaw*, 2 Wash. C. C. 167, *Fed. Cas. No.* 13,107; *Cropper v. Nelson*, 3 Wash. C. C. 125, *Fed. Cas. No.* 3,417; *Hargrove v. Creighton*, 1 Woods, 489, *Fed. Cas. No.* 6,064; *Lee v. Wilcocks*, 5 Serg. & R. (Pa.) 48. In New York and Massachusetts no allowance is made for the rate of exchange between the place where the suit is brought and the place where the debt is payable. *Adams v. Cordis*, 8 Pick. (Mass.) 260; *Cary v. Courteney*, 103 Mass. 316, 4 Am. Rep. 559; *Martin v. Franklin*, 4 Johns. (N. Y.) 124; *Scofield v. Day*, 20 Johns. (N. Y.) 102. See *Guietman v. Davis*, 45 Barb. 576, note; *Ladd v. Arkell*, 40 N. Y. Super. Ct. 150. See "*Payment*," *Dec. Dig. (Key No.)* §§ 9-12; *Cent. Dig.* §§ 38-61.

<sup>93</sup> *Williams v. Sims*, 22 Ala. 512; *Parks v. Marshall*, 10 Ind. 20; *Jones v. Chamberlin*, 30 Vt. 196; *Moore v. Fleming*, 34 Ala. 491; *Marr's Adm'r v. Prather*, 3 Metc. (Ky.) 196; *Williams v. Jones*, 12 Ind. 561; *Pierce v. Spader*, 13 Ind. 458. See "*Damages*," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353.

payment, the least beneficial alternative is the measure of damages for a breach.<sup>94</sup>

*Contract to Pay in Commodities*

There is a conflict of decisions as to the measure of damages for breach of an agreement to pay a certain sum in commodities at a certain rate. In some jurisdictions, such a contract is construed as an agreement to deliver commodities, and the damages for a breach is the value of the articles at that time.<sup>95</sup> In other jurisdictions, it is held that such a contract merely gives the debtor an election to pay in commodities instead of in money, and that such right is waived by failure to exercise it at the time agreed upon, and thereafter payment must be made in money.<sup>96</sup> We apprehend that the former rule is more consistent with the principle of compensation.

<sup>94</sup> *Hixon v. Hixon*, 7 Humph. (Tenn.) 33. See ante, p. 220. See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353.

<sup>95</sup> *Justrobo v. Price*, Harp. (S. C.) 111; *Wilson v. George*, 10 N. H. 445; *McDonald v. Hodge*, 5 Hayw. (Tenn.) 85; *Meserve v. Ammidon*, 109 Mass. 415; *Rose v. Bozeman*, 41 Ala. 678; *Davenport v. Wells*, 1 Iowa, 598; *Cole v. Ross*, 9 B. Mon. (Ky.) 393, 50 Am. Dec. 517; *Lyles v. Lyles' Ex'rs*, 6 Har. & J. (Md.) 273; *Noonan v. Ilsley*, 17 Wis. 314, 84 Am. Dec. 742. See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353; "Payment," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* §§ 34, 35.

<sup>96</sup> *Gleason v. Pinney*, 5 Cow. (N. Y.) 152; *Id.*, 5 Wend. (N. Y.) 393, 21 Am. Dec. 223; *Brooks v. Hubbard*, 3 Conn. 58, 8 Am. Dec. 154; *Perry v. Smith*, 28 Vt. 301; *Trowbridge v. Holcomb*, 4 Ohio St. 38; *Short v. Abernathy*, 42 Tex. 94; *Cummings v. Dudley*, 60 Cal. 383, 44 Am. Rep. 58; *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277. See "Damages," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* §§ 344-353; "Payment," *Dec. Dig. (Key No.)* §§ 9, 10; *Cent. Dig.* §§ 38-41; "Contracts," *Cent. Dig.* §§ 758-760.

## CHAPTER VII

## EXEMPLARY DAMAGES

87-88. In General.

89-90. When Recoverable.

91. Liability of Principal for Act of Agent.

## IN GENERAL

87. Exemplary, punitive, or vindictive damages are damages awarded in addition to compensation as a punishment to the defendant, and as a warning to other wrongdoers.
88. The authorities are in conflict as to whether exemplary damages can ever be allowed.
- (a) In some jurisdictions, exemplary damages cannot be recovered.
  - (b) In a few jurisdictions, exemplary damages, so called, may be recovered, but they are, in fact, compensatory.
  - (c) In most jurisdictions, exemplary damages may be recovered in cases of aggravated torts.
  - (d) In some jurisdictions, exemplary damages may be recovered for breach of contract accompanied by fraud or aggravated by willfully wanton and oppressive conduct.

*Nature and Origin of the Doctrine*

It is now a well-established principle in many jurisdictions that, in actions of tort, a jury may inflict what are called exemplary, punitive, or vindictive damages upon the defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.<sup>1</sup> Upon this princi-

<sup>1</sup>Day v. Woodworth, 13 How. 363, 371, 14 L. Ed. 181. Exemplary damages at common law are damages inflicted by way

ple, whenever the defendant, in committing the wrong complained of, acted recklessly, or willfully and maliciously, with a design to oppress and injure the plaintiff, in fixing the damages, the jury may disregard the rule of compensation, and award, beyond that, an additional sum, such as, in their discretion, they deem proper, as a punishment to defendant and as a protection to society against a violation of personal rights and social order.<sup>2</sup> The rule applies, also, in actions for willful injuries to property, and in actions of tort founded on negligence, amounting to misconduct or recklessness. This doctrine has been repeatedly attacked, and is open to objections hard to answer. It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded.<sup>3</sup> Even Mr. Sedgwick, who supported the doctrine in a controversy with Mr. Greenleaf, admits "that it is an exceptional or anomalous doctrine, at variance with the general rule of compensation; hence that, logically, it is wrong."<sup>4</sup> The principle owes its origin to the old rule that the jury were the sole judges of the damages.<sup>5</sup> Then, as now, when a wrong was accompanied by circumstances of aggravation, the jury was prone to return a verdict for large damages, which the court was powerless to set aside. The early cases amount to no more than a refusal to set aside such verdict;<sup>6</sup> but, from the intemperate

of punishment and warning. *Mayor v. Frobe*, 40 W. Va. 246, 22 S. E. 58. See "*Damages*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* §§ 188-192.

<sup>2</sup> *Voltz v. Blackmar*, 64 N. Y. 440, 444; *Huckle v. Money*, 2 Wils. 205; *Merest v. Harvey*, 5 Taunt. 442. See "*Damages*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* §§ 188-192.

<sup>3</sup> *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374. See "*Damages*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* §§ 188-192.

<sup>4</sup> *Sedgw. Dam.* § 353.

<sup>5</sup> *Sedgw. Dam.* § 354.

<sup>6</sup> See *Huckle v. Money*, 2 Wils. 205, and concurring opinion of Bathurst, J.; *Beardmore v. Carrington*, Id. 244; *Gray v. Grant* (C. B. Trin., 4 Geo. III.) Id. 252; *Sayer, Dam.* 227; *Tullidge v. Wade*, 3 Wils. 18; *Merest v. Harvey*, 5 Taunt. 442; *Sears v. Lyons*, 8 Starkie, 317; *Doe v. Filliter*, 13 Mees. & W. 47; *Rogers v. Spence*,

language sometimes used by the judges in justifying the verdict, the doctrine of exemplary damages sprung up, well characterized as "a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine." The principle was also confused with that allowing compensation for mental suffering; the circumstances of aggravation which would justify exemplary damages being generally such as would naturally cause mental suffering.<sup>7</sup>

It was said, in a leading case in New Hampshire,<sup>8</sup> that the modern erroneous idea of exemplary damages "originated in, and is, in fact, the same thing as, damages for wounded feelings, as distinguished from damages for an injury to the per-

Id. 571; *Merrills v. Manufacturing Co.*, 10 Conn. 384, 27 Am. Dec. 682. In these cases the term "actual damage" seems to be confined to pecuniary losses. The idea seems to be that reparation for mental suffering (i. e. "sense of wrong or insult") could only be made by way of punishment; that such injuries could not be compensated. See "*Damages*," *Cent. Dig.* §§ 188-192.

<sup>7</sup>Damages for mental pain and suffering are actual, not punitive. *Young v. Gormley*, 120 Iowa, 372, 94 N. W. 922. In *Fay v. Parker*, 53 N. H. 342, 384, 16 Am. Rep. 270, it is said: "If compensation were now understood, as it formerly was, to be made for injuries to material substance only, and exemplary damages were now understood, as they were formerly, to refer to injuries to the spiritual or mental part of human nature, there would be no trouble or difficulty in the matter; but in progress of time these definitions have changed. Compensatory damages now include injuries to the mental and spiritual part of mankind; and this change of definition, leaving nothing for 'exemplary damages,' as formerly understood, to operate upon and be applied to, by a very natural mistake the term 'exemplary' has been supposed to refer to criminal punishment for the sake of public example—an idea that was not included in 'exemplary damages,' as formerly understood." Cf. *Wiggin v. Coffin*, 3 Story, 1, Fed. Cas. No. 17,624; *King v. Root*, 4 Wend. (N. Y.) 113, 139, 21 Am. Dec. 102; *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; *Burr v. Burr*, 7 Hill (N. Y.) 207, 217; *Kendall v. Stone*, 3 Sandf. (N. Y.) 209; *Stimpson v. The Railroads*, 1 Wall. Ja. 164, 170, Fed. Cas. No. 13,456; *Grable v. Margrave*, 3 Scam. (Ill.) 373, 38 Am. Dec. 88; *Johnson v. Weedman*, 4 Scan. (Ill.) 495; *McNamara v. King*, 3 Gilman (Ill.) 432; *Day v. Woodworth*, 13 How. 363, 371, 14 L. Ed. 181. See "*Damages*," *Dec. Dig.* (Key No.) § 87; *Cent. Dig.* §§ 188-192.

<sup>8</sup>*Fay v. Parker*, 53 N. H. 342, 380, 16 Am. Rep. 270.

son or property. Damages for lacerated sensibilities, insulted honor, tyrannical oppression, etc., being much emphasized and often being the principal damage suffered by the plaintiff, and language being loosely used, and not preserving the true distinction carefully, or intemperately used in the heat of indignation which judges often felt and could not repress while contemplating an enormous outrage, it finally came to be understood that damages might be given in a civil suit as a punishment for an offense against the public—an idea that is certainly not plainly declared in the early cases. \* \* \* I venture to say that no case will be found in ancient—nor, indeed, in modern—reports in which a judge explicitly told a jury that they might, in an action for assault and battery, give the plaintiff four damages, viz.: (1) For loss of property, as for injury to his apparel, loss of labor and time, expenses of surgical assistance, nursing, etc.; (2) for bodily pain; (3) for mental suffering; and (4) for punishment of defendant's crime. But a critical examination of the cases will show, as I believe, that the fourth item is, in fact, comprehended in the third, but has grown into and become a separate and additional item, by inconsiderate, if not intemperate and angry, instructions, given to juries when the court was too much incensed by the exhibition of wanton malice, revenge, insult, and oppression, to weigh with coolness and deliberation the meaning of language used by other judges."

#### *Criticism of the Doctrine*

In giving the elements of damages Mr. Sedgwick distinguishes between "the mental suffering produced by the act or omission in question; vexation; anxiety"—which he holds to be grounds for compensatory damages—and "the sense of wrong or insult in the sufferer's breast, from an act dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade, or insult"—which he holds to be ground for exemplary damages only.<sup>9</sup> He maintains that the rule in favor of exemplary damages blends together the interests of society and the aggrieved individual, and gives damages, not

<sup>9</sup> Sedgw. Dam. §§ 37, 347.

only to recompense the sufferer, but to punish the offender, and that exemplary damages are in addition to actual damages.<sup>10</sup> We need add no authority to Mr. Sedgwick's, that, in actions for personal torts, mental suffering, vexation, and anxiety are subjects for compensation in damages; and it is difficult to see any distinction between these and the sense of wrong and insult arising from injustice and intention to vex and degrade.<sup>11</sup> The appearance of malicious intent may add to the sense of wrong; and equally whether such intent be really there or not. But that goes to mental suffering, and mental suffering to compensation.<sup>12</sup> It has been thought that this is a mere verbal criticism—a controversy as to the terminology of the law rather than as to the extent of the right of recovery, or real measure of damages; that what is given in some jurisdictions as exemplary damages is recovered in others as compensation for mental suffering, i. e. "the sense of wrong and insult."<sup>13</sup> This would be true if the question were simply whether certain elements of damage are to be regarded as compensatory or exemplary, the plaintiff in either event getting the advantage of them; but it manifestly be-

<sup>10</sup> "Damages for wounded feelings are compensatory in their nature. \* \* \* Exemplary damages are given because of the motive of the defendant, and it is well settled that when they are allowed it is in addition to compensatory damages for either physical or mental suffering." Sedgw. Dam. § 357; Harrison v. Ely, 120 Ill. 83, 11 N. E. 334; Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864; Root v. Sturdivant, 70 Iowa, 55, 29 N. W. 802; Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. 488; Hamilton v. Railroad Co., 35 N. Y. Super. Ct. 118; Craker v. Railroad Co., 36 Wis. 657, 17 Am. Rep. 504. See "Damages," Dec. Dig. (Key No.) § 87; Cent. Dig. §§ 188-192.

<sup>11</sup> In assessing damages for an assault and battery, the jury may consider, as an aggravation of the tort, the mental suffering of the plaintiff from the insult and indignity of defendant's blows. Smith v. Holcomb, 99 Mass. 552. See, also, Brown v. Swineford, 44 Wis. 282, 289, 28 Am. Rep. 582. See "Damages," Dec. Dig. (Key No.) § 87; Cent. Dig. §§ 188-192; "Assault and Battery," Dec. Dig. (Key No.) § 39; Cent. Dig. § 54.

<sup>12</sup> Craker v. Railway Co., 36 Wis. 657, 17 Am. Rep. 504. See "Damages," Dec. Dig. (Key No.) § 87; Cent. Dig. §§ 188-192.

<sup>13</sup> Sedgw. Dam. §§ 347, 354.



comes a matter of more than verbal consequence if the plaintiff is to receive and the defendant is to pay for the same elements of injury and damage twice—once as compensatory, and again as exemplary. A fortiori, it is of more than verbal consequence if the defendant is required to pay for the same thing a third time, by a fine, for the benefit of the public. It is of no consequence whether damages given for insult and oppression are called “exemplary” or “compensatory,” until fundamental constitutional rights are imperiled and overthrown by a misconception of the meaning of words. Then it becomes high time to express ideas in language that cannot be misunderstood.<sup>14</sup>

Where the wrong is at once a tort and a crime, it has been urged there are still graver objections to the doctrine.<sup>15</sup> Exemplary damages, in addition to full compensation for the injury suffered, subject the wrongdoer to punishment twice for the same offense; and, moreover, while the statute limits the pecuniary fine upon a criminal prosecution for such an act, there is but a vague limit to the exemplary damages which a jury may find in a civil action. It certainly appears to be an incongruity that one may be punished by the public, for the crime, upon a criminal prosecution, by a fine limited by statute, and again punished in favor of the sufferer, but in right of the public, for the same act, by exemplary damages, with little limit but the discretion of the jury. This is but another illustration of what appears to be the incongruity of the entire rule of exemplary damages.<sup>16</sup>

<sup>14</sup> *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270.

<sup>15</sup> “To punish a defendant civilly, by fine, is to violate not only the constitutional immunity, and also the synonymous maxim of the common law, ‘Nemo debet bis puniri,’ but also the other maxim (also synonymous), ‘Nemo debet bis vexari pro una et eadem causa.’ \* \* \* This privilege is secured to every American citizen, as firmly as the inalienable rights of life, liberty, or the pursuit of happiness, namely, he shall not be liable to be tried after an acquittal, nor twice vexed, nor twice punished, nor twice tried, nor twice put in jeopardy.” *Fay v. Parker*, 53 N. H. 342, 388, 389, 16 Am. Rep. 270. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 89, 90; *Cent. Dig.* §§ 202, 203.

<sup>16</sup> *Brown v. Swineford*, 44 Wis. 285, 28 Am. Rep. 582; *Spokane*

When all is said, it must be admitted that in some of its aspects the doctrine of exemplary damages is anomalous and illogical. "It has been suffered to lean upon and support itself by the supposed weight of authority rather than to stand upon principle and inherent strength."<sup>17</sup> The fact remains, however, that in a vast body of decisions damages have been allowed strictly in *pœnam*. The doctrine of these cases is to be sustained mainly on the ground of authority.<sup>18</sup>

*Jurisdictions in Which the Right to Exemplary Damages Is Denied or Limited*

In a few jurisdictions the entire doctrine of exemplary damages is repudiated, or has been limited. Full compensation for all the elements of damage suffered, including mental suffering—i. e. "sense of wrong and insult"—is the measure and limit of recovery. Thus Cooley, C. J., said, in an early Michigan case:<sup>19</sup> "The purpose of an action for tort is to recover the damages which the plaintiff has sustained from an injury done him by the defendant. In some cases the damages are incapable of pecuniary estimation, and the court performs its duty in submitting all the facts to the jury, and leaving them to estimate the plaintiff's damages as best they may under all the circumstances. In other cases there may be a partial estimate of damages by a money standard, but the invasion of the plaintiff's rights has been accompanied by circumstances of peculiar aggravation, which are calculated to vex and annoy the plaintiff, and cause him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for

*Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 11 L. R. A. 689, 26 Am. St. Rep. 842. But see post, p. 322. See "*Damages*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* §§ 188-192.

<sup>17</sup> Field, *Dam.* p. 79.

<sup>18</sup> Sedgw. *Dam.* § 354.

<sup>19</sup> *Stilson v. Gibbs*, 53 Mich. 280, 18 N. W. 815. See, also, *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81. See "*Damages*," *Dec. Dig. (Key No.)* §§ 87-90; *Cent. Dig.* §§ 188-202.

the wrong he has suffered. But in all cases it is to be distinctly borne in mind that compensation to the plaintiff is the purpose in view, and any instruction which is calculated to lead them to suppose that, besides compensating the plaintiff, they may punish the defendant, is erroneous." In this case, the instruction complained of authorized the jury, after estimating the actual damages of the plaintiff, to go further and give an additional sum, limited only by their discretion, by way of punishment and example, and for that reason was held erroneous.

This early view of the doctrine of exemplary damages has, however, been modified in Michigan. The rule at present seems to be not that there can never be exemplary damages, but only that exemplary damages should never be allowed when the injury is pecuniary and susceptible of full and definite money compensation. In certain aggravated torts, such as willful trespass, assault, libel, seduction, false imprisonment, and the like, the right to exemplary damages is recognized.<sup>20</sup>

It is nevertheless apparently the theory of the Michigan cases that exemplary damages are given, not by way of punishment, but solely for the purpose of securing full compensation. Thus, in *Ford v. Cheever*<sup>21</sup> the court said, in effect, that while it may not be error to refer to exemplary damages as such, the court should not permit juries to award capiously any sum which may appear just to them by way of punishment to the offender, but rather to award such a sum in addition to the actual damages, as, in their judgment, constitutes a just measure of compensation for injured feelings, in view of the circumstances of each particular case.

In West Virginia, the doctrine that, in a civil case, punitive,

<sup>20</sup> *DURFEE v. NEWKIRK*, 83 Mich. 522, 47 N. W. 351, Cooley, Cas. Damages, 182. See "*Damages*," *Dec. Dig. (Key No.)* §§ 89, 90; *Cent. Dig.* §§ 202, 203.

<sup>21</sup> 105 Mich. 679, 63 N. W. 975. And see, also, *Lucas v. Michigan Cent. R. Co.*, 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517. To the same effect, see *McChesney v. Wilson*, 132 Mich. 252, 93 N. W. 627. See "*Damages*," *Dec. Dig. (Key No.)* §§ 87-89; *Cent. Dig.* §§ 188-202.

vindictive, or exemplary damages can be imposed as a mere punishment to the defendant, was originally repudiated,<sup>22</sup> and it was held, upon a review of the cases, that the term "exemplary damages," when properly used, meant merely compensation for mental suffering, and not additional damages given as a punishment.<sup>23</sup> Damages called "exemplary" were held recoverable, but they were distinctly held to be compensatory. These cases, in so far as they hold that exemplary damages cannot be inflicted by way of punishment in a proper case, have been overruled after a full discussion of the subject.<sup>24</sup> The original West Virginia rule seems to be maintained in a few jurisdictions.<sup>25</sup>

The doctrine of exemplary damages has been denied in Colorado, Nebraska, New Hampshire, and Washington.<sup>26</sup>

<sup>22</sup> *Beck v. Thompson*, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870. See "*Damages*," *Dec. Dig. (Key No.)* §§ 87-89; *Cent. Dig.* §§ 188-202.

<sup>23</sup> *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485. See "*Damages*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* §§ 188-192.

<sup>24</sup> *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58. See, also, *Clairborne v. Chesapeake & O. Ry. Co.*, 46 W. Va. 363, 33 S. E. 262. See "*Damages*," *Dec. Dig. (Key No.)* §§ 87-89; *Cent. Dig.* §§ 188-202.

<sup>25</sup> See the Michigan cases ante, note 21. See, also, *Doerhoefer v. Shewmaker*, 123 Ky. 646, 97 S. W. 7; *Quigley v. Railroad Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Union Pac. R. Co. v. Hause*, 1 Wyo. 27. In some jurisdictions the expenses of litigation may be considered in assessing exemplary damages. *Marshall v. Betner*, 17 Ala. 833; *Patton v. Garrett*, 37 Ark. 605; *Huntley v. Bacon*, 15 Conn. 267; *Beecher v. Ferry Co.*, 24 Conn. 491; *Dalton v. Beers*, 38 Conn. 529; *Bennett v. Gibbons*, 55 Conn. 450, 12 Atl. 99; *Wynne v. Parsons*, 57 Conn. 73, 17 Atl. 362; *Hall v. Douglass*, 79 Conn. 266, 64 Atl. 351; *Titus v. Corkins*, 21 Kan. 722; *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 994; *Eatman v. Railway Co.*, 35 La. Ann. 1018; *New Orleans, J. & G. N. R. R. Co. v. Allbritton*, 38 Miss. 243, 75 Am. Dec. 98; *Roberts v. Mason*, 10 Ohio St. 277; *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524; *Stevenson v. Morris*, 37 Ohio St. 10, 41 Am. Rep. 481; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100. Contra, *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197. See "*Damages*," *Dec. Dig. (Key No.)* §§ 87-89; *Cent. Dig.* §§ 188-192.

<sup>26</sup> *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366; *Greeley, S. L. & P. Ry. Co. v. Yeager*, 11 Colo. 345, 18 Pac. 211; *City of Pueblo v. Timbers*, 31 Colo. 215, 72 Pac. 1059; *Riewe v.*

**WHEN RECOVERABLE**

**89.** In jurisdictions where exemplary damages are allowed, they can be recovered as a general rule only in actions of tort, and when the tort is accompanied by violence, oppression, gross negligence, malice, or fraud.

**EXCEPTIONS—(a)** Exemplary damages may be recovered for breach of promise of marriage.

**(b)** In some jurisdictions, exemplary damages may be recovered for breach of contract, accompanied by fraud, or aggravated by willfully wanton and oppressive conduct.

**(c)** In a few states exemplary damages may be recovered in an action on a statutory bond, where the breach of condition was a tort.

**(d)** In some jurisdictions, exemplary damages cannot be recovered where the tort is also a crime.

**90.** Liability to exemplary damages does not survive.

In most jurisdictions the doctrine has become firmly established that exemplary damages, in addition to compensation for the loss actually suffered, may be awarded as a punishment to defendant, and as a warning to others. But a civil action does not lie merely to inflict punishment. A cause of action must exist independently of the claim for exemplary damages. In other words, where damages are the gist of an action, proof of aggravating circumstances, such

McCormick, 11 Neb. 261, 9 N. W. 88; Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072, 11 L. R. A. 689, 26 Am. St. Rep. 842; Woodhouse v. Powles, 43 Wash. 617, 86 Pac. 1063, 8 L. R. A. (N. S.) 783, 117 Am. St. Rep. 1079; Caldwell v. Northern Pac. Ry. Co., 56 Wash. 223, 105 Pac. 635. See "Damages," Dec. Dig. (Key No.) §§ 87-91; Cent. Dig. §§ 188-202.

as would ordinarily justify the infliction of exemplary damages, is alone insufficient to maintain the action. Some actual loss must be proved,<sup>27</sup> though in a few jurisdictions a right to recover nominal damages has been held sufficient to sustain an allowance of exemplary damages.<sup>28</sup> Where a wrongdoer dies before trial, only compensatory damages can be recovered against his estate. The liability to exemplary damages does not survive.<sup>29</sup> In an action against joint wrongdoers, the bad motives of some of the defendants will not be imputed to the others, and therefore exemplary damages cannot be recovered unless all of the defendants acted so as to become liable therefor.<sup>30</sup> The plaintiff has an election to

<sup>27</sup> *Meidel v. Anthia*, 71 Ill. 241; *Flanagan v. Womack*, 54 Tex. 45; *Martin v. Leslie*, 93 Ill. App. 44; *COLE v. GREY*, 70 Kan. 705, 79 Pac. 654; *Cooley, Cas. Dam.* p. 184; *Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804; *Stacy v. Publishing Co.*, 68 Me. 279; *Robinson v. Goings*, 63 Miss. 500; *Jones v. Matthews*, 75 Tex. 1, 12 S. W. 823; *Cody v. Lowry* (Tex. Civ. App.) 91 S. W. 1109; *Boardman v. Marshalltown Grocery Co.*, 105 Iowa, 445, 75 N. W. 343. See "*Damages*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 191.

<sup>28</sup> *ALABAMA & G. S. R. CO. v. SELLERS*, 93 Ala. 9, 9 South. 375, 30 Am. St. Rep. 17; *Cooley, Cas. Damages*, 185; *Wilson v. Vaughn* (C. C.) 23 Fed. 229; *Press Pub. Co. v. Monroe*, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353; *Goodson v. Stewart*, 154 Ala. 660, 46 South. 239; *Vlasservitch v. Augusta & A. Ry. Co.*, 85 S. C. 291, 67 S. E. 306; *Fields v. Lancaster Cotton Mills*, 77 S. C. 546, 58 S. E. 608, 11 L. R. A. (N. S.) 822, 122 Am. St. Rep. 593. See "*Damages*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 191.

<sup>29</sup> *Edwards v. Ricks*, 30 La. Ann. 926; *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 51 South. 775; *Morris v. Duncan*, 126 Ga. 467, 54 S. E. 1045, 115 Am. St. Rep. 105; *Ripley v. Miller*, 33 N. C. 247; *Wright v. Donnell*, 34 Tex. 291. Vindictive damages are awarded as a punishment against a wrongdoer, and not as compensation for the injured person. Therefore they cannot be given in an action against personal representatives of a decedent on account of the wrong of decedent. *Sheik v. Hobson*, 64 Iowa, 146, 19 N. W. 875. But the rule does not apply on the death of the defendant after verdict, when nothing remained to be done but dispose of a motion for new trial and enter up judgment. *Wilkins v. Wainwright*, 173 Mass. 212, 53 N. E. 397. See "*Damages*," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 217.

<sup>30</sup> *Suth. Dam.* § 407; *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317. See "*Damages*," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* §§ 206-215.

sue joint tort feasons, either jointly or severally. By suing them jointly, he waives any claim for exemplary damages, unless all acted from bad motives.<sup>31</sup> In such a case, the measure of damage is the actual loss sustained from the joint wrong. To recover exemplary damages, the suit should be against the party who alone acted so as to incur the liability.<sup>32</sup> "It would be very unjust to make the malignant motive of one party a ground of aggravation of damage against the other party, who was altogether free from any improper motive. In such case, the plaintiff ought to select the party against whom he means to get the aggravated damages."<sup>33</sup> Where the plaintiff has no election, but must join all the defendants, exemplary damages are not waived. Thus, where husband and wife must be sued jointly for a tort of the wife, judgment for exemplary damages may be given against both.<sup>34</sup>

Exemplary damages, being designed to punish the wrongdoer, can be justified only where the wrong was willful or wanton, and their allowance is limited to that class of cases.<sup>35</sup>

<sup>31</sup> *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746; *McCarthy v. De Armit*, 99 Pa. 63. It was held that damages should be assessed against the least culpable defendant, and, unless all the defendants were liable for exemplary damages, none could be recovered. And see *City of Lowell v. Short*, 4 Cush. (Mass.) 275. See "Damages," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* §§ 206-215.

<sup>32</sup> *Becker v. Dupree*, 75 Ill. 167. See "Damages," *Dec. Dig. (Key No.)* §§ 92, 93; *Cent. Dig.* §§ 206-222.

<sup>33</sup> *Clark v. Newsam*, 1 Exch. 131. See "Damages," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* §§ 206-215.

<sup>34</sup> *Munter v. Bande*, 1 Mo. App. 484; *Lombard v. Batchelder*, 58 Vt. 558, 5 Atl. 511. See 3 *Suth. Dam. c.* 26. See "Damages," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* §§ 206-215.

<sup>35</sup> *Laird v. Chicago & A. R. Co.*, 78 Mo. App. 273; *Aaron v. Southern Ry.*, 68 S. C. 98, 46 S. E. 556; *Snedecor v. Pope*, 143 Ala. 275, 39 South. 318; *Hayes v. Southern Ry. Co.*, 141 N. C. 195, 53 S. E. 847; *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Reeder v. Purdy*, 48 Ill. 261; *Farwell v. Warren*, 70 Ill. 28; *Toledo, W. & W. Ry. Co. v. Roberts*, 71 Ill. 540; *Miller v. Kirby*, 74 Ill. 242; *Scott v. Bryson*, 74 Ill. 420; *Becker v. Dupree*, 75 Ill. 167; *Moore v. Crose*, 43 Ind. 30; *Brown v. Allen*, 35 Iowa, 306;

Actual malice,<sup>86</sup> wantonness,<sup>87</sup> oppression, brutality, insult,<sup>88</sup>

*Tyson v. Ewing*, 3 J. J. Marsh. (Ky.) 185; *Elliott v. Herz*, 29 Mich. 203; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625; *Dow v. Julien*, 32 Kan. 576, 4 Pac. 1000; *Hansley v. Jamesville & W. R. Co.*, 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600; *Wanamaker v. Bowes*, 36 Md. 42. Lack of reasonable grounds for believing allegations made to procure an attachment will not justify exemplary damages. *Nordhaus v. Peterson*, 54 Iowa, 68, 6 N. W. 77. Exemplary damages cannot be recovered for accidental or unintentional injuries. *Walker v. Fuller*, 29 Ark. 448; *Tripp v. Grouner*, 60 Ill. 474; *Waller v. Waller*, 76 Iowa, 513, 41 N. W. 307; *Jackson v. Schmidt*, 14 La. Ann. 818; *Blodgett v. Town of Brattleboro*, 30 Vt. 579; *U. S. v. Taylor (C. C.)* 35 Fed. 484; *Ames v. Hilton*, 70 Me. 36; *Sapp v. Railway Co.*, 51 Md. 115. An idiot is not liable for exemplary damages. *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140. A municipal corporation cannot be held for exemplary damages. *City of Chicago v. Langlass*, 52 Ill. 256, 4 Am. Rep. 603. See "*Damages*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 193-201.

<sup>86</sup> *Ralston v. The State Rights, Crabbe*, 22, Fed. Cas. No. 11,540; *Dibble v. Morris*, 26 Conn. 416; *Kilbourn v. Thompson*, 1 McAr. & M. (D. C.) 401; *Sherman v. Dutch*, 16 Ill. 283; *Moore v. Crose*, 43 Ind. 30; *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530, 7 Am. St. Rep. 600; *Webb v. Gilman*, 80 Me. 177, 13 Atl. 688; *Joice v. Branson*, 73 Mo. 28; *Sowers v. Sowers*, 87 N. C. 303; *Philadelphia Traction Co. v. Orbann*, 119 Pa. 37, 12 Atl. 816; *Pittsburgh, C. & St. L. Ry. Co. v. Lyon*, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. Rep. 517. See "*Damages*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 193-201.

<sup>87</sup> *Goetz v. Ambbs*, 27 Mo. 28; *Green v. Craig*, 47 Mo. 90; *Brasineton v. South Bound R. Co.*, 62 S. C. 325, 40 S. E. 655, 89 Am. St. Rep. 905; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152. See, also, cases cited in note 36, ante. Wantonness means reckless disregard of consequences. President, etc., of Baltimore & Y. T. R. Co. v. Boone, 45 Md. 344; *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530, 7 Am. St. Rep. 600. See "*Damages*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 193-201.

<sup>88</sup> *Reeder v. Purdy*, 48 Ill. 261; *Cutler v. Smith*, 57 Ill. 252; *Smith v. Wunderlich*, 70 Ill. 426; *Drohn v. Brewer*, 77 Ill. 280; *Moore v. Crose*, 43 Ind. 30; *Jennings v. Maddox*, 8 B. Mon. (Ky.) 430; *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530, 7 Am. St. Rep. 600; *Webb v. Gilman*, 80 Me. 177, 13 Atl. 688; *Raynor v. Nims*, 37 Mich. 34, 26 Am. Rep. 493; *Joice v. Branson*, 73 Mo. 28; *Bowden v. Bailes*, 101 N. C. 612, 8 S. E. 342; *Philadelphia Traction Co. v. Orbann*, 119 Pa. 37, 12 Atl. 816; *Redfield v. Redfield*, 75 Iowa, 435, 39 N. W. 688; *Sears v. Lyons*, 2 Starkie, 317. Abuse



fraud,<sup>39</sup> or gross negligence<sup>40</sup> are sufficient to justify the al-

of process is sufficient ground. *Huckle v. Money*, 3 Wils. 305; *Nightingale v. Scannell*, 18 Cal. 315; *Louder v. Hinson*, 49 N. C. 369; *Rodgers v. Ferguson*, 36 Tex. 544; *Shaw v. Brown*, 41 Tex. 446. So also is willful refusal to perform official duty. *Wilson v. Vaughn* (C. C.) 23 Fed. 229; *Elbin v. Wilson*, 33 Md. 135. A passenger rudely and wrongfully expelled from a train may recover exemplary damages. *Philadelphia W. & B. R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442; *Knowles v. Norfolk S. R. Co.*, 102 N. C. 59, 9 S. E. 7; but not where the conductor acted honestly, and there were no aggravating circumstances, *Fitzgerald v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 79; *Philadelphia, W. & B. R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442; *Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 663; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Yates v. New York Cent. & H. R. R. Co.*, 67 N. Y. 100; *Tomlinson v. Wilmington & S. R. Co.*, 107 N. C. 327, 12 S. E. 138. See "Damages," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 193-201.

\* *Sedgw. Dam.* § 367. See *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. 530, 7 Am. St. Rep. 600. Contra, *Singleton v. Kennedy*, 9 B. Mon. (Ky.) 222, 226. See "Damages," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 193-201; "Fraud," *Dec. Dig. (Key No.)* § 61; *Cent. Dig.* § 63.

\* *Emblen v. Myers*, 6 Hurl. & N. 54; *Louisville & N. R. Co. v. Earl's Adm'x*, 94 Ky. 368, 22 S. W. 607; *U. S. v. Taylor* (C. C.) 35 Fed. 484; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Lienkauf v. Morris*, 66 Ala. 406; *Citizens' St. Ry. Co. v. Steen*, 42 Ark. 321; *Western Union Tel. Co. v. Eyser*, 2 Colo. 141; *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79; *Kilbourn v. Thompson*, 1 McAr. & M. (D. C.) 401; *Frink v. Coe*, 4 G. Greene (Iowa) 555, 61 Am. Dec. 141; *Cochran v. Miller*, 13 Iowa, 128; *Bowler v. Lane*, 3 Metc. (Ky.) 311; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563; *Komantz v. Brown*, 16 B. Mon. (Ky.) 577; *Wilkinson v. Drew*, 75 Me. 360; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Hopkins v. Atlanta & St. L. R. R.*, 36 N. H. 9, 72 Am. Dec. 287; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Pittsburgh, C. & St. L. Ry. Co. v. Lyon*, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. Rep. 517; *Byram v. McGuire*, 3 Head (Tenn.) 530; *Kolb v. Bankhead*, 18 Tex. 228; *Yerian v. Linkletter*, 80 Cal. 135, 22 Pac. 70. But it would seem that the negligence must be so gross as to partake of the nature of wantonness or recklessness. *Arkansas & L. Ry. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130; *Atchison, T. & S. F. Ry. Co. v. Ringle*, 71 Kan. 839, 80 Pac. 43; *Boyd v. Blue Ridge Ry. Co.*, 65 S. C. 326, 43 S. E. 817. See "Damages," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 193-201.

lowance of exemplary damages. Good faith<sup>41</sup> and provocation<sup>42</sup> may be shown in mitigation of damages. Evidence of defendant's wealth or poverty is admissible;<sup>43</sup> for what

<sup>41</sup> Where defendant acted in good faith, he is not liable to exemplary damages. *St. Peter's Church v. Beach*, 26 Conn. 355; *Oursler v. Baltimore & O. R. Co.*, 60 Md. 358; *Millard v. Brown*, 35 N. Y. 297; *Bennett v. Smith*, 23 Hun (N. Y.) 50; *Tracy v. Swartwout*, 10 Pet. 80, 9 L. Ed. 354; *Plummer v. Harbut*, 5 Iowa, 308; *Pierce v. Getchell*, 76 Me. 216; *Pratt v. Pond*, 42 Conn. 318; *Nightingale v. Scannell*, 18 Cal. 315; unless he acted in a cruel and abusive manner, *Dalton v. Beers*, 38 Conn. 529. See, also, *Johnson v. Camp*, 51 Ill. 219; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Jasper v. Purnell*, 67 Ill. 358; *Raynor v. Nims*, 37 Mich. 34, 26 Am. Rep. 493. Where defendant acted on advice of counsel, exemplary damages cannot be recovered. *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Cochran v. Tuttle*, 75 Ill. 361; *Murphy v. Larson*, 77 Ill. 172; *Livingston v. Burroughs*, 33 Mich. 511; *Carpenter v. Barber*, 44 Vt. 441; *Shores v. Brooks*, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332. Defendant's honest belief that he was acting in the right will prevent or mitigate exemplary damages. *Wilkinson v. Searcy*, 76 Ala. 176; *Farwell v. Warren*, 70 Ill. 28; *Allison v. Chandler*, 11 Mich. 542; *Brown v. Allen*, 35 Iowa, 306; *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819. See "*Damages*," *Dec. Dig. (Key No.)* §§ 91, 179; *Cent. Dig.* §§ 193-206, 476, 477.

<sup>42</sup> *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41; *Johnson v. Von Kettler*, 66 Ill. 63; *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538; *Currier v. Swan*, 63 Me. 323; *Kiff v. Youmans*, 86 N. Y. 324, 331, 40 Am. Rep. 543; *Huftalin v. Misner*, 70 Ill. 55. See "*Damages*," *Dec. Dig. (Key No.)* §§ 91, 179; *Cent. Dig.* §§ 193-201, 476, 477.

<sup>43</sup> *Brown v. Evans* (C. C.) 17 Fed. 912, 8 Sawy. 498; *CHELLIS v. CHAPMAN*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, *Cooley, Cas. Damages*, 279; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *Jacobs' Adm'r v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263; *Sloan v. Edwards*, 61 Md. 89; *McCarthy v. Niskern*, 22 Minn. 90; *Peck v. Small*, 35 Minn. 465, 29 N. W. 69; *Whitfield v. Westbrook*, 40 Miss. 311; *Buckley v. Knapp*, 48 Mo. 152; *Bennett v. Hyde*, 6 Conn. 24; *Belknap v. Boston & M. R. R.*, 49 N. H. 358; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *McBride v. McLaughlin*, 5 Watts (Pa.) 375; *Dush v. Fitzhugh*, 2 Lea (Tenn.) 307; *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561; *Harman v. Cundiff*, 82 Va. 239; *Spear v. Sweeney*, 88 Wis. 545, 60 N. W. 1060; *Birchard v. Booth*, 4 Wis. 67; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6; *Winn v. Peckham*, 42 Wis. 493;

would be a heavy punishment for a poor man might be no punishment at all for a rich one, and vice versa.

*Province of Court and Jury*

It is the province of the court to determine whether there is any evidence to support an award of exemplary damages.<sup>44</sup> It is the province of the jury to determine whether or not such damages should be awarded.<sup>45</sup> It is error to submit the question to the jury, in the absence of any evidence to sus-

Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582; Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768; Hare v. Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141; Spear v. Hiles, 67 Wis. 350, 30 N. W. 506. But contra, Guengerech v. Smith, 34 Iowa, 348. Defendant may show his poverty in rebuttal, Mullin v. Spangenberg, 112 Ill. 149; Rea v. Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561; or in chief, Johnson v. Smith, 64 Me. 553. It has been held that evidence of the pecuniary condition of plaintiff is admissible, Beck v. Dowell, 111 Mo. 506, 20 S. W. 209, 33 Am. St. Rep. 547 (action for personal injuries); Gaither v. Blowers, 11 Md. 536; McNamara v. King, 7 Ill. 432 (assault and battery); Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88 (seduction); Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303. See, also, Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141. See "Damages," Dec. Dig. (Key No.) §§ 91, 181; Cent. Dig. §§ 193-201, 473, 474, 499.

\* Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Southern R. in Kentucky v. Hawkins, 121 Ky. 415, 89 S. W. 258; City of Chicago v. Martin, 49 Ill. 241, 95 Am. Dec. 590; Heil v. Glanding, 42 Pa. 493, 82 Am. Dec. 537; Kennedy v. North Missouri R. Co., 36 Mo. 351. See "Damages," Dec. Dig. (Key No.) § 208; Cent. Dig. §§ 205, 220.

\* Pratt v. Pond, 42 Conn. 318; Robinson v. Superior Rapid-Transit Ry. Co., 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205, 59 Am. St. Rep. 897; CHELLIS v. CHAPMAN, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, Cooley, Cas. Damages, 279; Dye v. Denham, 54 Ga. 224; Johnson v. Smith, 64 Me. 553; Smith v. Thompson, 55 Md. 5, 39 Am. Rep. 409; Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Graham v. Pacific R. Co., 66 Mo. 536; Nagle v. Mullison, 34 Pa. 48; Martin v. Leslie, 93 Ill. App. 44; Hawk v. Ridgway, 33 Ill. 473. Punitive damages for slander are not allowed as a matter of right, but their recovery rests in the sound discretion of the jury. Nicholson v. Rogers, 129 Mo. 136, 31 S. W. 260. The jury's discretion is not arbitrary, but is a sound legal discretion. Cox v. Birmingham Ry., Light & Power Co., 163 Ala. 170, 50 South. 975. See "Damages," Dec. Dig. (Key No.) § 208; Cent. Dig. §§ 205, 220.

tain a verdict for exemplary damages,<sup>46</sup> and it is error to instruct the jury to give exemplary damages, for they rest solely in the discretion of the jury, and cannot be claimed as a matter of law.<sup>47</sup> The amount of exemplary damages is limited only by the sound discretion of the jury,<sup>48</sup> but where the verdict is so excessive as to show passion, prejudice, or corruption, the court may set it aside.<sup>49</sup>

\* *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Rose v. Story*, 1 Pa. 190, 44 Am. Dec. 121; *Amer v. Longstreth*, 10 Pa. 145; *Pittsburgh Southern Ry. Co. v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580; *Philadelphia Traction Co. v. Orbann*, 119 Pa. 37, 12 Atl. 816; *Bradshaw v. Buchanan*, 50 Tex. 492. See "*Damages*," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 205, 220.

\* *Hawk v. Ridgway*, 33 Ill. 473; *Wabash, St. L. & P. Ry. Co. v. Rector*, 104 Ill. 296; *Louisville & N. R. Co. v. Brooks' Adm'x*, 83 Ky. 129, 4 Am. St. Rep. 135; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Jerome v. Smith*, 48 Vt. 230, 21 Am. Rep. 125; *Boardman v. Goldsmith*, 48 Vt. 403; *Snow v. Carpenter*, 49 Vt. 426; *Webb v. Gilman*, 80 Me. 177, 13 Atl. 688; *Jacobs v. Sire*, 4 Misc. Rep. 398, 23 N. Y. Supp. 1063. Contra, *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565; *Fox v. Wunderlich*, 64 Iowa, 187, 20 N. W. 7; *Thill v. Pohlman*, 76 Iowa, 638, 41 N. W. 385; *Hodgson v. Millward*, 3 Grant, Cas. (Pa.) 406; *Platt v. Brown*, 30 Conn. 336; *Coryell v. Colbaugh*, 1 N. J. Law, 77, 1 Am. Dec. 192. See "*Damages*," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 205, 220.

\* *Graham v. Pacific R. Co.*, 66 Mo. 536; *Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. 588; *Yazoo & M. V. R. Co. v. Mitchell*, 83 Miss. 179, 35 South. 339; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Johnson v. Smith*, 64 Me. 553; *Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Canfield v. Chicago, R. I. & P. Ry. Co.*, 59 Mo. App. 354. In *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785, the court refused to set aside a verdict of \$4,500 against a railroad company for carrying a passenger 400 yards beyond his station, and refusing to return. The court said there was "no legal measurement, save their discretion." See "*Damages*," *Dec. Dig. (Key No.)* §§ 94, 208; *Cent. Dig.* §§ 205, 220.

\* *Flannery v. Baltimore & O. R. Co.*, 4 Mackey, 111; *Cutler v. Smith*, 57 Ill. 252; *Farwell v. Warren*, 70 Ill. 28; *Collins v. Council Bluffs*, 35 Iowa, 432; *Goetz v. Ambs*, 27 Mo. 28; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Rogers v. Henry*, 32 Wis.

*In What Actions Recoverable*

As a general rule, exemplary damages can be recovered only in actions of tort, and will not be allowed on a mere breach of contract.<sup>50</sup> Actions for breach of promise of marriage, however, constitute an exception to the rule,<sup>51</sup> and in some jurisdictions exemplary damages are allowed for breach of contract accompanied by fraud,<sup>52</sup> or where the breach is aggravated by willfully wanton or oppressive conduct.<sup>53</sup> It has been held, also, that exemplary damages can be recovered

327. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1171; *Cent. Dig.* §§ 4546-4554; "*Damages*," *Dec. Dig. (Key No.)* § 94; *Cent. Dig.* § 221.

<sup>50</sup> *Sedg. Dam.* § 370. *Gordon v. Brewster*, 7 Wis. 355; *Snow v. Grace*, 25 Ark. 570; *Hoy v. Grenoble*, 34 Pa. 9, 75 Am. Dec. 628; *Ford v. Fargason*, 120 Ga. 708, 48 S. E. 180; *Trout v. Watkins, Livery & Undertaking Co.*, 148 Mo. App. 621, 130 S. W. 136. See "*Damages*," *Dec. Dig. (Key No.)* § 89; *Cent. Dig.* § 203.

<sup>51</sup> *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. 321; *Johnson v. Jenkins*, 24 N. Y. 252; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *CHELLIS v. CHAPMAN*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, *Cooley, Cas. Damages*, 279; *Jacoby v. Stark*, 205 Ill. 34, 65 N. E. 557; *Tamke v. Vangsues*, 72 Minn. 236, 75 N. W. 217; *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* § 46.

<sup>52</sup> *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232; *PRINCE v. STATE MUT. LIFE INS. CO.*, 77 S. C. 187, 57 S. E. 766, *Cooley, Cas. Damages*, 187. See "*Damages*," *Dec. Dig. (Key No.)* § 89; *Cent. Dig.* § 203.

<sup>53</sup> As in the cases of breach by carrier of the contract of transportation. See *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; *Birmingham Ry. Light & Power Co. v. Nolan*, 134 Ala. 329, 32 South. 715; *Louisville & N. R. Co. v. Keller*, 104 Ky. 768, 57 S. W. 1072; *Jackson Electric Ry., Light & Power Co. v. Lowry*, 79 Miss. 431, 30 South. 634; *Hutchison v. Southern Ry. Co.*, 140 N. C. 123, 53 S. E. 263; *Gilman v. Florida Cent. & P. R. Co.*, 53 S. C. 210, 31 S. E. 224. In *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1, it was held that where a member of a liverymen's association let a hearse and carriage to plaintiff for the funeral of his child, but, on finding that the person in charge was an undertaker and liveryman doing business outside the association, he and the secretary called the teams from plaintiff's house just as they were about to be used, to carry out its rules that members of the association should not furnish a carriage or hearse under such circumstances, their act is illegal, making them liable for punitive damages. See "*Damages*," *Dec. Dig. (Key No.)* § 89; *Cent. Dig.* § 203.

in an action on a statutory bond, where its condition was broken by a tort such as would ordinarily justify the infliction of exemplary damages.<sup>54</sup> In suits in equity, exemplary damages are never given.<sup>55</sup> Where the circumstances justify it, exemplary damages may be recovered in actions for assault and battery,<sup>56</sup> false imprisonment,<sup>57</sup> malicious prosecution,<sup>58</sup>

<sup>54</sup> *Floyd v. Hamilton*, 33 Ala. 235; *Richmond v. Shickler*, 57 Iowa, 486, 10 N. W. 882; *Renkert v. Elliott*, 11 Lea (Tenn.) 235. *Contra*, *Cobb v. People*, 84 Ill. 511; *McClendon v. Wells*, 20 S. C. 514. Exemplary damages are not recoverable against the sureties on a bond for a distress warrant. *Hamilton v. Kilpatrick* (Tex. Civ. App.) 29 S. W. 819. Sureties on sequestrations or replevin bonds are not liable for exemplary damages on account of the malice of the principal. *McArthur v. Barnes*, 10 Tex. Civ. App. 318, 31 S. W. 212. And see *North v. Johnson*, 58 Minn. 242, 59 N. W. 1012. See "Attachment," *Dec. Dig. (Key No.)* § 351; *Cent. Dig.* §§ 1291, 1295; "Damages," *Cent. Dig.* § 204.

<sup>55</sup> All claims to exemplary damages are waived by coming into equity. *Bird v. Wilmington & M. R. Co.*, 8 Rich. Eq. (S. C.) 46, 64 Am. Dec. 739. See "Damages," *Cent. Dig.* § 204.

<sup>56</sup> *Wagner v. Gibbs*, 80 Miss. 53, 31 South. 434, 92 Am. St. Rep. 598; *Blackmore v. Ellis*, 70 N. J. Law, 264, 57 Atl. 1047; *Hanna v. Sweeney*, 78 Conn. 492, 62 Atl. 785, 4 L. R. A. (N. S.) 907; *Pratt v. Davis*, 118 Ill. App. 161, affirmed in 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609; *Nichols v. Brabazon*, 94 Wis. 549, 69 N. W. 342; *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668; *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12; *McNamara v. King*, 7 Ill. 432; *Reeder v. Purdy*, 48 Ill. 261; *Drohn v. Brewer*, 77 Ill. 280; *Harrison v. Ely*, 120 Ill. 83, 11 N. E. 334; *Root v. Sturdivant*, 70 Iowa, 55, 29 N. W. 802; *Titus v. Corkins*, 21 Kan. 722; *Slater v. Sherman*, 5 Bush (Ky.) 206; *Pike v. Dilling*, 48 Me. 539; *Webb*

<sup>57</sup> *Huckle v. Money*, 3 Wils. 205; *Bradley v. Morris*, 44 N. C. 395; *Harness v. Steele*, 159 Ind. 286, 64 N. E. 875; *McCarthy v. De Armit*, 99 Pa. 63; *Grohmann v. Kirschman*, 168 Pa. 189, 33 Atl. 32; *Clissold v. Machell*, 26 U. C. Q. B. 422. See "False Imprisonment," *Dec. Dig. (Key No.)* § 35; *Cent. Dig.* § 112.

<sup>58</sup> *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Lylton v. Baird*, 95 Ind. 349; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Coleman v. Allen*, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; *Parkhurst v. Masteller*, 57 Iowa, 474, 10 N. W. 864; *McWilliams v. Hoban*, 42 Md. 56; *Peck v. Small*, 35 Minn. 465, 29 N. W. 69; *Winn v. Peckham*, 43 Wis. 493; *Spear v. Hiles*, 67 Wis. 350, 30 N. W. 506; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101. See "Malicious Prosecution," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* § 157.

wrongful issuance and execution of process,<sup>59</sup> defamation,<sup>60</sup>

v. Gilman, 80 Me. 177, 13 Atl. 688; President, etc., of Baltimore & Y. Turnpike Road v. Boone, 45 Md. 344; Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Crosby v. Humphreys, 59 Minn. 92, 60 N. W. 843; Green v. Craig, 47 Mo. 90; Canfield v. Chicago, R. I. & P. R. Co., 59 Mo. App. 354; Cook v. Ellis, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; Louder v. Hinson, 49 N. C. 369; Porter v. Seiler, 23 Pa. 424, 62 Am. Dec. 341; Newell v. Whitcher, 53 Vt. 589, 38 Am. Rep. 703; Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152; Shay v. Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538. But in some states the right to exemplary damages in assault and battery is denied, because defendant is also subject to criminal prosecution. Borkenstein v. Schrack, 31 Ind. App. 220, 67 N. E. 547. See, also, post, p. 322. See "*Assault and Battery*," *Dec. Dig. (Key No.)* § 39; *Cent. Dig.* § 54.

\* Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505; W. F. Vandiver & Co. v. Waller, 143 Ala. 411, 39 South. 136; Hatchell v. Chandler, 62 S. C. 380, 40 S. E. 777; Polykranas v. Krausz, 73 App. Div. 583, 77 N. Y. Supp. 46; South Penn. Oil Co. v. Stone (Tenn. Ch. App.) 57 S. W. 374. See "*Malicious Prosecution*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* § 157; "*Process*," *Dec. Dig. (Key No.)* § 171; *Cent. Dig.* § 259.

\* Clark v. North American Co., 203 Pa. 346, 53 Atl. 237; Lee v. Crump, 146 Atl. 655, 40 South. 609; Orth v. Featherly, 87 Mich. 315, 49 N. W. 640; Palmer v. Mahin, 120 Fed. 737, 57 C. C. A. 41; Philadelphia, W. & B. R. Co. v. Quigley, 31 How. 202, 16 L. Ed. 73; Binford v. Young, 115 Ind. 174, 16 N. E. 142; Daly v. Van Benthuyssen, 3 La. Ann. 69; Buckley v. Knapp, 48 Mo. 152; Nicholson v. Rogers, 129 Mo. 136, 31 S. W. 260; King v. Root, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102; Sowers v. Sowers, 87 N. C. 303; Press Pub. Co. v. McDonald, 11 C. C. A. 155, 63 Fed. 238, 26 L. R. A. 63; Barr v. Moore, 87 Pa. 385, 30 Am. Rep. 367; Rea v. Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561; Harman v. Cundiff, 82 Va. 239; Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. 488 (newspaper libel); Klewin v. Bauman, 53 Wis. 244, 10 N. W. 398. Express malice must be shown. Republican Pub. Co. v. Conroy, 5 Colo. App. 262, 38 Pac. 423; Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40. Cf. Smith v. Matthews, 9 Misc. Rep. 427, 29 N. Y. Supp. 1058. The falsity of the defamation is evidence of malice. Bergmann v. Jones, 94 N. Y. 51. But exemplary damages may be recovered, in the absence of express malice, if the defamation was wanton. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342. The bad character of plaintiff is admissible in mitigation of exemplary damages. Maxwell v. Kennedy, 50 Wis. 645, 7 N. W. 657. See "*Libel and Slander*," *Dec. Dig. (Key No.)* § 120; *Cent. Dig.* §§ 350, 351.

willful injuries to person<sup>61</sup> or property,<sup>62</sup> and in actions of trover<sup>63</sup> and replevin.<sup>64</sup> In actions founded on loss of

<sup>61</sup> *Dalton v. Beers*, 38 Conn. 529; *Georgia R. R. v. Olds*, 77 Ga. 673; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Philadelphia, W. & B. R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442; *Knowles v. Norfolk S. R. Co.*, 102 N. C. 59, 9 S. E. 7; *Higgins v. Railroad Co.*, 64 Miss. 80, 8 South. 176; *Dorrah v. Illinois Cent. R. Co.*, 65 Miss. 14, 3 South. 36, 7 Am. St. Rep. 629; *Louisville & N. R. Co. v. Greer* (Ky.) 29 S. W. 337. Vindictive damages cannot be recovered for injuries received by one voluntarily assisting in harnessing a vicious horse. *Brown v. Green*, 1 Pennewill (Del.) 535, 42 Atl. 991. See "*Damages*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 193-195, 204.

<sup>62</sup> *U. S. v. Taylor* (C. C.) 35 Fed. 484; *Devaughn v. Heath*, 37 Ala. 595; *Clark v. Bales*, 15 Ark. 452; *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149; *Shores v. Brooks*, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332; *Cutler v. Smith*, 57 Ill. 252; *Chicago & I. R. Co. v. Baker*, 73 Ill. 316; *Keirnan v. Heaton*, 69 Iowa, 136, 28 N. W. 478; *Briggs v. Milburn*, 40 Mich. 512; *Craig v. Cook*, 28 Minn. 232, 9 N. W. 712; *Parker v. Shackelford*, 61 Mo. 68; *Perkins v. Towle*, 43 N. H. 220, 80 Am. Dec. 149; *Winter v. Peterson*, 24 N. J. Law, 524, 61 Am. Dec. 678; *Allaback v. Utt*, 51 N. Y. 651; *Greenville & C. R. Co. v. Partlow*, 14 Rich. (S. C.) 237; *Cox v. Crumley*, 5 Lea (Tenn.) 529; *Cook v. Garza*, 9 Tex. 358; *Camp v. Camp*, 59 Vt. 667, 10 Atl. 748; *Koenigs v. Jung*, 73 Wis. 178, 40 N. W. 801; *Cumberland Tel. & Tel. Co. v. Poston*, 94 Tenn. 696, 30 S. W. 1040 (wanton destruction of ornamental trees). See "*Damages*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 196, 197, 204.

<sup>63</sup> *Dennis v. Barber*, 6 Serg. & R. (Pa.) 420; *Harger v. McMains*, 4 Watts (Pa.) 418; *Taylor v. Morgan*, 3 Watts (Pa.) 333; *Silver v. Kent*, 60 Miss. 124. Contra, *Berry v. Vantries*, 12 Serg. & R. (Pa.) 89. See "*Trover and Conversion*," *Dec. Dig. (Key No.)* § 60; *Cent. Dig.* §§ 281, 282; "*Damages*," *Cent. Dig.* § 204.

<sup>64</sup> *Cable v. Dakin*, 20 Wend. (N. Y.) 172; *McDonald v. Scaife*, 11 Pa. 381, 51 Am. Dec. 556; *Brizee v. Maybee*, 21 Wend. (N. Y.) 144; *Holt v. Van Eps*, 1 Dak. 206, 46 N. W. 689; *Whitfield v. Whitfield*, 40 Miss. 352; *McCabe v. Morehead*, 1 Watts & S. (Pa.) 513; *Schofield v. Ferrers*, 46 Pa. 438; *Single v. Schneider*, 30 Wis. 570. Contra, *Butler v. Mehrling*, 15 Ill. 488; *Hotchkiss v. Jones*, 4 Ind. 260. It would seem that the rule should be the same in actions of detainee. *Whitfield v. Whitfield*, 40 Miss. 352. Contra, *McDonald v. Norton*, 72 Iowa, 652, 34 N. W. 458. See "*Replevin*," *Dec. Dig. (Key No.)* § 81; "*Damages*," *Cent. Dig.* § 204.



service, as for enticement,<sup>65</sup> seduction,<sup>66</sup> criminal conversation,<sup>67</sup> and for harboring plaintiff's wife,<sup>68</sup> exemplary damages may be recovered. But in the case of physical injury to a child or servant, exemplary damages can be recovered only in an action by the child or servant. They cannot be recovered in an action by the parent or master for loss of services.<sup>69</sup>

*Exemplary Damages for Torts Which Are Also Crimes*

In actions of tort, where the tort is also a crime, it is held, in some jurisdictions, that exemplary damages cannot be recovered; for the defendant would be thereby subjected to double punishment for the same offense.<sup>70</sup> In other juris-

<sup>65</sup> *Smith v. Goodman*, 75 Ga. 198; *Tyson v. Ewing*, 3 J. J. Marsh. (Ky.) 185; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Magee v. Holland*, 27 N. J. Law, 86, 72 Am. Dec. 341. See "*Master and Servant*," *Dec. Dig. (Key No.)* § 340; *Cent. Dig.* § 1285.

<sup>66</sup> *Robinson v. Burton*, 5 Har. (Del.) 335; *Grable v. Margrave*, 3 Scam. (Ill.) 372, 38 Am. Dec. 88; *Stevenson v. Belknap*, 6 Iowa, 97, 71 Am. Dec. 392; *Fox v. Stevens*, 13 Minn. 272 (Gil. 252); *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768; *Kendrick v. McCrary*, 11 Ga. 603; *Irwin v. Dearman*, 11 East, 23. See "*Seduction*," *Dec. Dig. (Key No.)* § 21; *Cent. Dig.* § 47.

<sup>67</sup> *Johnson v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Matheis v. Mazet*, 164 Pa. St. 580, 30 Atl. 434. See *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614 (action by wife for enticing away husband). See, also, *Long v. Booe*, 106 Ala. 570, 17 South. 716. See "*Husband and Wife*," *Dec. Dig. (Key No.)* § 334; *Cent. Dig.* § 1125.

<sup>68</sup> *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666. See "*Husband and Wife*," *Dec. Dig. (Key No.)* § 334; *Cent. Dig.* § 1125.

<sup>69</sup> *Bube v. Birmingham Ry., Light & Power Co.*, 140 Ala. 276, 37 South. 285, 103 Am. St. Rep. 33; *Black v. Carrollton R. Co.*, 10 La. Ann. 33, 63 Am. Dec. 586; *Hyatt v. Adams*, 16 Mich. 180; *Whitney v. Hitchcock*, 4 Denio (N. Y.) 461. Contra, *Klingman v. Holmes*, 54 Mo. 304. See "*Damages*," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* § 215.

<sup>70</sup> *Spokane Truck & Dray Co. v. Hofer*, 2 Wash. 45, 25 Pac. 1072, 11 L. R. A. 689, 26 Am. St. Rep. 842; *Murphy v. Hobbs*, 7 Colo. 541, 5 Prac. 119, 49 Am. Rep. 366; *Huber v. Teuber*, 3 McArthur (D. C.) 484, 36 Am. Rep. 110; *Cherry v. McCall*, 23 Ga. 193; *Tracy v. Hackett*, 19 Ind. App. 133, 49 N. E. 185, 65 Am. St. Rep. 398; *Borkenstein v. Schrack*, 31 Ind. App. 220, 67 N. E. 547; *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Butler v. Mercer*, 14 Ind. 479;

dictions, this is considered no objection to the allowance of exemplary damages, and it is not even admissible in mitigation.<sup>71</sup> "Judgment for the criminal offense is for the offense against the public. Judgment for the tort is for the offense against the private sufferer. \* \* \* Though punitive damages go in the right of the public, for example, they do not go by way of public punishment, but by way of private damages,—for the act as a tort and not as a crime,—to the private sufferer and not to the state. Though they are allowed beyond compensation of the private sufferer, they still go to him, for himself, as damages allowed to him by law, in addition to his actual damages, like the double and treble damages sometimes allowed by statute. Considered as strictly punitive, the damages are for the punishment of the private tort, not of the public crime."<sup>72</sup> In some jurisdictions, the

*Nossaman v. Rickert*, 18 Ind. 350; *Humphries v. Johnson*, 20 Ind. 190; *Meyer v. Bohlring*, 44 Ind. 238; *Ziegler v. Powell*, 54 Ind. 173; *Stewart v. Maddox*, 63 Ind. 51; *Farman v. Lauman*, 73 Ind. 568; *State v. Stevens*, 103 Ind. 55, 2 N. E. 214, 53 Am. Rep. 482; *Austin v. Wilson*, 4 Cush. (Mass.) 273, 50 Am. Dec. 766; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270. See "*Damages*," *Dec. Dig. (Key No.)* § 90; *Cent. Dig.* § 202.

<sup>71</sup> *Brown v. Evans*, 8 Sawy. 488, 17 Fed. 912; *Phillips v. Kelly*, 29 Ala. 628; *Wilson v. Middleton*, 2 Cal. 54; *Bundy v. Maginess*, 76 Cal. 532, 18 Pac. 668; *Jefferson v. Adams*, 4 Har. (Del.) 321; *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12; *Hendrickson v. Kingsbury*, 21 Iowa, 379; *Garland v. Wholeham*, 26 Iowa, 185; *Guengerich v. Smith*, 36 Iowa, 587; *Redden v. Gates*, 52 Iowa, 210, 2 N. W. 1079; *HAUSER v. GRIFFITH*, 102 Iowa, 215, 71 N. W. 223; *Cooley, Cas. Damages*, 189; *Doerhoefer v. Shewmaker*, 123 Ky. 646, 97 S. W. 7; *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Boetcher v. Staples*, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295; *Wheatley v. Thorn*, 23 Miss. 62; *Corwin v. Walton*, 18 Mo. 71, 59 Am. Dec. 285; *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; *Sowers v. Sowers*, 87 N. C. 303; *Roberts v. Mason*, 10 Ohio St. 277; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367; *Wolff v. Cohen*, 8 Rich. (S. C.) 144; *Cole v. Tucker*, 6 Tex. 266; *Edwards v. Leavitt*, 46 Vt. 126; *Klopfer v. Bromme*, 26 Wis. 372; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468. See "*Damages*," *Dec. Dig. (Key No.)* § 90; *Cent. Dig.* § 202.

<sup>72</sup> *Brown v. Swinford*, 44 Wis. 285, 28 Am. Rep. 582. See *Mayer*

*Liability of Corporations*

It is usually held that corporations are liable to exemplary damages for the acts of their agents or servants, in cases where the agent or servant would be liable to such damages.<sup>80</sup>

\* Times Pub. Co. v. Carlisle, 94 Fed. 762, 36 C. C. A. 475; Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Maisenbacker v. Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; New York Life Ins. Co. v. People, 95 Ill. App. 136, affirmed in 195 Ill. 430, 63 N. E. 264; Cowen v. Winters, 96 Fed. 929, 37 C. C. A. 628; LITTLE ROCK RY. & ELECTRIC CO. v. DOBBINS, 78 Ark. 553, 95 S. W. 788, Cooley, Cas. Damages, 224; Little Rock Traction & Electric Co. v. Winn, 75 Ark. 529, 87 S. W. 1025; Atchison, T. & S. F. R. Co. v. Long, 5 Kan. App. 644, 47 Pac. 993; Sommerfield v. St. Louis Transit Co., 108 Mo. App. 718, 84 S. W. 172; Citizens' St. Ry. Co. v. Steen, 42 Ark. 321; Western Union Tel. Co. v. Eyser, 2 Colo. 141; Flannery v. Baltimore & O. R. Co., 4 Mackey, D. C. 111; Illinois Cent. R. Co. v. Hammer, 72 Ill. 353; Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 29 Am. Rep. 43; Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296; Wheeler & Wilson Manufg Co. v. Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571; Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; Bowler v. Lane, 3 Metc. (Ky.) 311; Jacobs v. Louisville & N. R. Co., 10 Bush (Ky.) 263; Central Pass. R. Co. v. Chatterson (Ky.) 29 S. W. 18; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530, 7 Am. St. Rep. 600; GODDARD v. GRAND TRUNK RY. OF CANADA, 57 Me. 202, 2 Am. Rep. 39, Cooley, Cas. Damages, 190; Hanson v. European & N. A. Ry. Co., 62 Me. 84, 16 Am. Rep. 404; Baltimore & O. R. Co. v. Blocher, 27 Md. 277; President, etc., of Baltimore & Y. T. R. v. Boone, 45 Md. 344; Baltimore & O. R. Co. v. Barger, 80 Md. 23, 30 Atl. 560, 26 L. R. A. 220; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155, 28 Am. Rep. 442; Vicksburg & J. R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552; Perkins v. Missouri, K. & T. R. Co., 55 Mo. 201; Travers v. Kansas Pac. Ry. Co., 63 Mo. 421; Canfield v. Chicago, R. I. & P. Ry. Co., 59 Mo. App. 354; Belknap v. Boston & M. R. Co., 49 N. H. 358; Atlantic & G. W. Ry. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Lake Shore & M. S. Ry. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. 545; Philadelphia Traction Co. v. Orbann, 119 Pa. 37, 12 Atl. 816; Quinn v. South Carolina R. Co., 29 S. C. 381, 7 S. E. 614, 1 L. R. A. 682; Louisville & N. R. Co. v. Garrett, 8 Lea (Tenn.) 438, 41 Am. Rep. 640. A railroad company has been held liable for exemplary damages for the act of a corporation operating its road as a lessee, see Hart v. Railroad Co., 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794; and for act of conductor in ejecting passenger, Southern Kan-

This is placed on the ground that otherwise corporations would never be liable for exemplary damages, since they can act only by agents or servants. Thus it has been said:<sup>81</sup> "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases when such act is directly or impliedly ratified; for no such cases will occur. A corporation is an imaginary being. It has no mind but the mind of its servants. It has no voice but the voice of its servants. It has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as schemes of public enterprise, are conceived by human minds and executed by human hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, or the punishment of the servant and the punishment of the corporation, are sheer nonsense, and only tend to confuse the mind and confound the judgment." In many jurisdictions, however, the same rule is applied to corporations as is applied to individuals, and the corporation is not liable unless it authorized or ratified the act.<sup>82</sup> Obviously,

see *R. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; *GODDARD v. GRAND TRUNK RY. OF CANADA*, 57 Me. 302, 2 Am. Rep. 39, Cooley, Cas. Damages, 190; *Lucas v. Michigan Cent. R. Co.*, 98 Mich. 1, 56 N. W. 1039, 39 Am. St. Rep. 517; *Louisville, N. A. & C. R. Co. v. Wolfe*, 128 Ind. 347, 27 N. E. 606, 25 Am. St. Rep. 436. Cf. *LAKE SHORE & M. S. R. CO. v. PRENTICE*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, Cooley, Cas. Damages, 194. See "*Corporations*," *Dec. Dig. (Key No.)* § 498; *Cent. Dig.* § 1909.

<sup>81</sup>*GODDARD v. GRAND TRUNK RY. CO. OF CANADA*, 57 Me. 302, 2 Am. Rep. 39, Cooley, Cas. Damages, 190. See, also, *Hanson v. European & N. A. Ry. Co.*, 62 Me. 84, 16 Am. Rep. 404. See "*Corporations*," *Dec. Dig. (Key No.)* § 498; *Cent. Dig.* § 1909.

<sup>82</sup>*City Nat. Bank v. Jeffries*, 73 Ala. 183; *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Mendelshon v. Anaheim Lighter Co.*, 40 Cal. 657; *McCoy v. Philadelphia, W. & B. R. Co.*,

a corporation can authorize or ratify an act of an agent only by the act of another agent. A distinction must be drawn between directors and other agents, whose acts are the acts of the corporation, and mere servants.

5 *Houst. (Del.)* 599; *Hill v. New Orleans, O. & G. W. R. Co.*, 11 *La. Ann.* 292; *Great Western Ry. Co. of Canada v. Miller*, 19 *Mich.* 305; *Ackerson v. Erie Ry. Co.*, 32 *N. J. Law*, 254; *Murphy v. Central Park, N. & E. R. Co.*, 48 *N. Y. Super. Ct.* 96; *Sullivan v. Oregon Ry. & Nav. Co.*, 12 *Or.* 392, 7 *Pac.* 508, 53 *Am. Rep.* 364; *Keil v. Chartiers Val. Gas Co.*, 131 *Pa.* 466, 19 *Atl.* 78, 17 *Am. St. Rep.* 823. Cf. *Lake Shore & M. S. Ry. Co. v. Rosenzweig*, 113 *Pa.* 519, 6 *Atl.* 545; *Philadelphia Traction Co. v. Orbann*, 119 *Pa.* 37, 12 *Atl.* 816; *Hagan v. Providence & W. R. Co.*, 3 *R. I.* 88, 62 *Am. Dec.* 377; *Hays v. Houston G. N. R. Co.*, 46 *Tex.* 272; *Galveston, H. & S. A. Ry. Co. v. Donahoe*, 56 *Tex.* 162; *Ristine v. Blocker*, 15 *Colo. App.* 224, 61 *Pac.* 486; *Peterson v. Middlesex & Somerset Traction Co.*, 71 *N. J. Law*, 296, 59 *Atl.* 456; *Norfolk & W. R. Co. v. Anderson*, 90 *Va.* 1, 17 *S. E.* 757, 44 *Am. St. Rep.* 884; *Vassau v. Madison Electric Ry. Co.*, 106 *Wis.* 301, 82 *N. W.* 152; *Townsend v. Texas & N. O. Ry. Co.*, 40 *Tex. Civ. App.* 71, 88 *S. W.* 302; *Ricketts v. Chesapeake & O. Ry. Co.*, 33 *W. Va.* 433, 10 *S. E.* 801, 7 *L. R. A.* 354, 25 *Am. St. Rep.* 901; *Milwaukee & M. R. Co. v. Finney*, 10 *Wis.* 388; *Bass v. Chicago & N. W. R. Co.*, 36 *Wis.* 450, 17 *Am. Rep.* 495, 39 *Wis.* 636; *Craker v. Chicago & N. W. Ry. Co.*, 36 *Wis.* 657, 17 *Am. Rep.* 504; *Eviston v. Cramer*, 57 *Wis.* 570, 15 *N. W.* 760; *LAKE SHORE & M. S. R. CO. v. PRENTICE*, 147 *U. S.* 101, 13 *Sup. Ct.* 261, 37 *L. Ed.* 97, *Cooley, Cas. Damages*, 194; *The Normannia (D. C.)* 62 *Fed.* 469; *Beers v. Hamburg-American Packet Co., Id.* Where a railroad company ratifies the malicious act of its conductor in removing a passenger from a train with unnecessary force, it is liable for exemplary damages. *International & G. N. Ry. Co. v. Miller*, 9 *Tex. Civ. App.* 104, 28 *S. W.* 233. See "*Corporations*," *Dec. Dig. (Key No.)* § 498; *Cent. Dig.* § 1909.

## CHAPTER VIII.

## PLEADING AND PRACTICE

92. Allegation of Damage—The Ad Damnum.

93-95. Form of Statement.

96-97. Province of Court and Jury.

## ALLEGATION OF DAMAGE—THE AD DAMNUM

92. When the object of an action is to recover damages, the declaration should allege that the injury is to the damage of the plaintiff, and the amount of the damage should be stated. The recovery cannot, in general, exceed the amount specified, though it may be less.

The declaration in an action at law consists of a statement of the facts upon which plaintiff bases his right to relief. When the action is to recover damages, the declaration should allege that the facts resulted in damage to the plaintiff.<sup>1</sup> The amount should be stated, and should be fixed sufficiently high to cover the real demand, as the plaintiff cannot, in general, recover a greater amount than he has alleged.<sup>2</sup> But the jury

<sup>1</sup>Griffith v. Dodgson, 103 App. Div. 542, 93 N. Y. Supp. 155. See, also, Jonas v. Hirshburg, 18 Ind. App. 581, 48 N. E. 656. See "Damages," *Dec. Dig. (Key No.)* § 141; *Cent. Dig.* §§ 406-408.

<sup>2</sup>Annis v. Upton, 66 Barb. (N. Y.) 370; DAVIS v. BOWERS GRANITE CO., 75 Vt. 286, 54 Atl. 1084, Cooley, Cas. Damages, 199; McIntire v. Clark, 7 Wend. (N. Y.) 330; Habig v. Parker, 76 Neb. 102, 107 N. W. 127; Lake v. Merrill, 10 N. J. Law, 288; Herbert v. Hardenbergh, 10 N. J. Law, 222; Hawk v. Anderson, 9 N. J. Law, 319; Stafford v. City of Oskaloosa, 57 Iowa, 748, 11 N. W. 668; Davenport v. Bradley, 4 Conn. 309; Henderson v. Stainton, Hardin, 118; Robinett v. Morris' Arm's, Hardin (Ky.) 93; Tyner v. Hays, 37 Ark. 599; White v. Cannada, 25 Ark. 41; Snow v. Grace, 25 Ark. 570; Derrick v. Jones, 1 Stew. (Ala.) 18; Hall v. Hall, 42 Ind. 585; McWhorter v. Sayre, 2 Stew. (Ala.) 225; Rowan v. Lee, 3 J. J. Marsh. (Ky.) 97; Edwards v. Wiester, 2 A. K. Marsh. (Ky.) 382; Cheveley v. Morris, 2 W. Bl. 1300;

may find a less amount than that alleged. The mere fact that a plaintiff claims more than the facts alleged entitle him to will not render the declaration demurrable,<sup>3</sup> but he cannot recover more than the facts will warrant.<sup>4</sup> After verdict, it will be presumed that the damages were assessed according to the proof.<sup>5</sup>

The portion of the declaration alleging and claiming damages is called the "ad damnum." It is usually considered as a legal conclusion from the facts stated. Where this is true, it cannot be traversed, and is not admitted by a failure to

*Curtiss v. Lawrence*, 17 Johns. (N. Y.) 111; *Fish v. Dodge*, 4 Denio (N. Y.) 311, 47 Am. Dec. 254; *Pierson v. Finney*, 37 Ill. 29; *Kelley v. Third Nat. Bank of Chicago*, 64 Ill. 541; *Lantz v. Frey*, 19 Pa. 366; *David v. Conard*, 1 G. Greene (Iowa) 336; *Cameron v. Boyle*, 2 G. Greene (Iowa) 154. But see *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456, where it was held error to instruct the jury not to give damages above the ad damnum. The error in rendering a verdict in excess of the ad damnum may be cured by plaintiff remitting the excess, or the ad damnum may be amended. *Harris v. Jaffray*, 3 Har. & J. (Md.) 543; *Cahill v. Pintony*, 4 Munf. (Va.) 371; *Schneider v. Seely*, 40 Ill. 257; *Pickering v. Pulsifer*, 9 Ill. 79; *Grass Valley Quartz Min. Co. v. Stackhouse*, 6 Cal. 413; *Lantz v. Frey*, 19 Pa. 366. See *Corning v. Corning*, 6 N. Y. 97; *Tyner v. Hays*, 37 Ark. 599; *Miller v. Weeks*, 22 Pa. 89; *McClannahan v. Smith*, 76 Mo. 428; *Johnson v. Brown*, 57 Barb. (N. Y.) 118; *Deane v. O'Brien*, 13 Abb. Prac. (N. Y.) 11; *Dressler v. Davis*, 13 Wis. 58; *Moore v. Tracy*, 7 Wend. (N. Y.) 229; *Palmer v. Wylie*, 19 Johns. (N. Y.) 276; *Jackson v. Covert's Adm'rs*, 5 Wend. (N. Y.) 139; *Crabb's Ex'rs v. Nashville Bank*, 6 Yerg. (Tenn.) 332. Where double damages are claimed, the ad damnum limits the actual damage. *Rosevelt v. Hanold*, 65 Mich. 414, 32 N. W. 443. See "Damages," *Dec. Dig. (Key No.)* §§ 153, 210; *Cent. Dig.* §§ 422-425; "Judgment," *Dec. Dig. (Key No.)* § 253; *Cent. Dig.* §§ 443, 444.

<sup>3</sup> *Leland v. Tousey*, 6 Hill (N. Y.) 328; *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223. See "Damages," *Dec. Dig. (Key No.)* § 153; *Cent. Dig.* §§ 422-425.

<sup>4</sup> *Murphy v. Evans*, 11 Ind. 517; *Wainwright v. Weske*, 82 Cal. 196, 23 Pac. 12. See "Damages," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* § 354; "Judgment," *Dec. Dig. (Key No.)* § 248; *Cent. Dig.* §§ 443-445.

<sup>5</sup> *Van Rensselaer's Ex'rs v. Platner's Ex'rs*, 2 Johns. Cas. (N. Y.) 17. See "Damages," *Dec. Dig. (Key No.)* § 162.

answer or deny it.<sup>6</sup> It is a matter of form, not of substance.<sup>7</sup> If it is omitted, or left blank, the judgment is not for that reason void.<sup>8</sup> In some jurisdictions the allegation of the amount of damages is considered an allegation of fact, and traversable.<sup>9</sup> In code states a declaration will not support a judgment by default unless it contains an allegation of damages.<sup>10</sup>

<sup>6</sup>Jenkins v. Steanka, 19 Wis. 126, 88 Am. Dec. 675; Bartelt v. Braunsdorf, 57 Wis. 1, 14 N. W. 869; Raymond v. Traffarn, 12 Abb. Prac. (N. Y.) 52; Woodruff v. Cook, 25 Barb. (N. Y.) 505; McKensie v. Farrell & Higgins, 4 Bosw. (N. Y.) 192; Thompson v. Lumley, 7 Daly (N. Y.) 74; Newman v. Otto, 4 Sandf. (N. Y.) 468; McLees v. Felt, 11 Ind. 218. See "Damages," Dec. Dig. (Key No.) §§ 153, 154; "Pleading," Dec. Dig. (Key No.) § 129; Cent. Dig. § 273.

<sup>7</sup>Connoss v. Meir, 2 E. D. Smith (N. Y.) 314. See "Damages," Dec. Dig. (Key No.) §§ 153, 154; Cent. Dig. §§ 422-425.

<sup>8</sup>Galena & C. U. R. Co. v. Appleby, 28 Ill. 283; Mattingly v. Darwin, 23 Ill. 618; Hargrave v. Penrod, 1 Ill. 401, 12 Am. Dec. 201; Bank of Metropolis v. Guttschlick, 14 Pet. 19, 10 L. Ed. 335; Stephens v. White, 2 Wash. (Va.) 203. See, also, Kennedy v. Woods, 3 Bibb. (Ky.) 322; Digges v. Norris, 3 Hen. & M. (Va.) 268; Palmer v. Mill, 3 Hen. & M. 502. A complaint which omits to aver the amount of damages is not for that reason demurrable, if it contains a prayer for judgment in a specified amount. Bank of British Columbia v. City of Port Townsend, 16 Wash. 450, 47 Pac. 896. See "Damages," Dec. Dig. (Key No.) §§ 141, 153; Cent. Dig. §§ 406-412, 422-425.

<sup>9</sup>Brownson v. Wallace, 4 Blatchf. 465, Fed. Cas. No. 2,042; Tucker v. Parks, 7 Colo. 62, 298, 1 Pac. 427, 3 Pac. 486; Carlyon v. Lannan, 4 Nev. 156; Cole v. Hoeburg, 36 Kan. 263, 13 Pac. 275; White v. Northwest Stage Co., 5 Or. 99. Failure to deny the amount claimed admits that that is the correct amount due. Huston v. Twin & City Creek Turnpike Road Co., 45 Cal. 550; Dimick v. Campbell, 31 Cal. 238; Patterson v. Ely, 19 Cal. 28. See "Pleading," Dec. Dig. (Key No.) § 125; Cent. Dig. §§ 259, 260.

<sup>10</sup>Simonson v. Blake, 12 Abb. Prac. (N. Y.) 331; Walton v. Walton, 32 Barb. (N. Y.) 203; Pittsburgh Coal Min. Co. v. Greenwood, 39 Cal. 71; Gautier v. English, 29 Cal. 165; Parrott v. Den, 34 Cal. 79. Under a statute providing that in actions on contracts express or implied for the recovery of money only, allegations of the amount of damages shall be taken as true if not controverted, proof of the amount of damages in an action for breach of promise was held unnecessary. Cole v. Hoeburg, 36 Kan. 263, 13 Pac. 275. See "Judgment," Dec. Dig. (Key No.) § 118; Cent. Dig. § 234.



**SAME—FORM OF STATEMENT**

**93. With respect to questions of pleading, damages are divided into two classes:**

- (a) General, and**
- (b) Special.**

**94. General damages are such as necessarily result from the wrong complained of. They are therefore presumed by law, and need not be specifically alleged.**

**95. Special damages are such as are not the necessary consequence of the wrong complained of, but which actually occur as a proximate result thereof. They are not presumed by law, and must be pleaded specially and circumstantially, or compensation therefor cannot be recovered.**

Mr. Chitty says: "Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in itself—as when some particular damage arises from the uttering of slanderous words actionable in themselves—or are such as arise from an act indifferent, and not actionable in itself, but only injurious in its consequences."<sup>11</sup> Again: "It does not appear necessary to state the former description of the damages in the declaration, because presumptions of law are not, in general, to be pleaded or averred as facts. \* \* \* But, when the law does not necessarily imply that the plaintiff sustained the damages by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. \* \* \*

And whenever the damages sustained have not nec-

<sup>11</sup> Chit. Pl. 410.

essarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant, which might otherwise ensue at the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus, in an action of trespass and false imprisonment, where the plaintiff offered to give in evidence that during the imprisonment he was stinted in his allowance of food, he was not permitted to do so, because the fact was not, as it should have been, stated in the declaration; and in a similar action it was held that the plaintiff could not give evidence of his health being injured, unless specially stated. So, in trespass 'for taking a horse,' nothing can be given in evidence which is not expressed in the declaration; and, if money was paid over in order to regain possession, such payment should be alleged as special damages."<sup>12</sup> These rules are equally applicable to pleadings under the code or common-law systems.<sup>13</sup>

It has been seen that nominal damages can be recovered only in cases where the law will presume damage.<sup>14</sup> Such damages are necessarily general. They could not be specially pleaded. All that is necessary is that the declaration shall state facts constituting a cause of action.<sup>15</sup>

Compensatory damages, strictly so called, may be either general or special. In either case the plaintiff must prove the amount. If they are general, the law may presume that some

<sup>12</sup> *Id.* 411.

<sup>13</sup> *Brown v. Hannibal & St. J. R. Co.*, 99 Mo. 310, 12 S. W. 655; *Rosenberger v. Marsh*, 108 Iowa, 47, 78 N. W. 837; *Baldwin v. Western R. Corp.*, 4 Gray (Mass.) 333; *Harshman v. Rose*, 50 Neb. 113, 69 N. W. 755; *Croco v. Oregon Short-Line R. Co.*, 18 Utah, 311, 54 Pac. 985, 44 L. R. A. 285; *Eisele v. Oddie* (C. C.) 128 Fed. 941; *WEST CHICAGO ST. R. CO. v. LEVY*, 182 Ill. 525, 55 N. E. 554, *Cooley, Cas. Damages*, 200. See "*Damages*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* § 413.

<sup>14</sup> See ante, p. 30.

<sup>15</sup> *Cowley v. Davidson*, 10 Minn. 392 (Gil. 314); *Hood v. Palm*, 8 Pa. 237; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739. See "*Damages*," *Dec. Dig. (Key No.)* §§ 141, 153; *Cent. Dig.* §§ 406-425.

such damage resulted, but it cannot presume anything as to its amount. The plaintiff must therefore show the amount by evidence, or only nominal damages can be recovered.<sup>16</sup> Where compensation is sought for special damage, its amount must be proved, at least approximately, or nothing can be recovered.

Exemplary damages need not be specially pleaded *eo nomine*, but it is usually necessary that the facts justifying an allowance of such damages should be alleged.<sup>17</sup> It has been held that, where exemplary damages are claimed on the ground of malice, malice must be pleaded.<sup>18</sup>

<sup>16</sup> See *ante*, pp. 30, 100; *Suth. Dam.* § 9; *Sedg. Dam.* § 97; *Freese v. Crary*, 29 Ind. 524; *Carl v. Granger Coal Co.*, 69 Iowa, 519, 29 N. W. 437; *Thorp v. Bradley*, 75 Iowa, 50, 39 N. W. 177; *Bruce v. Pettengill*, 12 N. H. 341. See "*Damages*," *Dec. Dig. (Key No.)* §§ 9, 163, 184; *Cent. Dig.* §§ 7-15, 454, 502.

<sup>17</sup> *Gustafson v. Wind*, 62 Iowa, 281, 17 N. W. 523; *Andrews v. Stone*, 10 Minn. 72 (Gil. 52); *Wilkinson v. Drew*, 75 Me. 360; *Southern Exp. Co. v. Brown*, 67 Miss. 260, 7 South. 318, 8 South. 425, 19 Am. St. Rep. 306; *Savannah, F. & W. Ry. Co. v. Holland*, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 4 South. 359, 5 Am. St. Rep. 354; *Board of Directors of St. Francis Levee Dist. v. Reddit*, 79 Ark. 154, 95 S. W. 482; *Louisville & N. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554; *Hayden v. Fair Haven & W. R. Co.*, 76 Conn. 355, 56 Atl. 613; *Mason v. Macon Railway & Light Co.*, 123 Ga. 773, 51 S. E. 569; *Shoemaker v. Sonju*, 15 N. D. 518, 108 N. W. 42; *Pickett v. Southern Ry. Co.*, 69 S. C. 445, 48 S. E. 466; *Richmond Passenger & Power Co. v. Robinson*, 100 Va. 394, 41 S. E. 719. And see *Greeney v. Pennsylvania Water Co.*, 29 Pa. Super. Ct. 136; *Ogden v. Gibbons*, 5 N. J. Law, 518. But in Missouri and Texas exemplary damages must be separately stated in the complaint. *St. Louis Clothing Co. v. J. D. Hail Dry Goods Co.*, 156 Mo. 393, 56 S. W. 1112; *Malin & Browder v. McCutcheon*, 33 Tex. Civ. App. 387, 76 S. W. 586. See, also, *International & G. N. R. Co. v. Smith*, 62 Tex. 252. See "*Damages*," *Dec. Dig. (Key No.)* § 151; *Cent. Dig.* §§ 420, 421.

<sup>18</sup> *Johnson v. Chicago, R. I. & P. R. Co.*, 51 Iowa, 25, 50 N. W. 543; *Jones v. Marshall*, 56 Iowa, 739, 10 N. W. 264. In an action for malicious prosecution, exemplary damages may be recovered without being specially pleaded, as such damages arise from the existence of malice. *Davis v. Seeley*, 91 Iowa, 583, 60 N. W. 183, 51 Am. St. Rep. 356. See "*Damages*," *Dec. Dig. (Key No.)* § 151; *Cent. Dig.* §§ 420, 421.

*Illustrations*

Bodily and mental suffering are the necessary consequence of a personal injury. They are therefore general, and not special items of damage, and may be proved without being pleaded.<sup>19</sup> In an action for personal injuries, under an allegation that plaintiff was thereby prevented from attending to his ordinary business, he cannot show the amount of his earnings in a particular business.<sup>20</sup> "As the business is not stated, nor any earnings or loss of earnings mentioned, the allegation referred to can only be construed as intended to characterize the injury, and indicate its extent and permanence in a general way, which amounts simply to a claim for general damages, and lays no foundation at all for proof of special damages. The evidence referred to was not intended simply to show the effect and extent of the injury, but to enhance the damages, by showing the loss of earnings in a special employment, requiring some special skill and training. These damages, therefore, were not the necessary result of the acts set out in the declaration, and could not be implied by law; but they were special damages, which, in order to prevent a surprise upon the defendant, must be particularly specified

<sup>19</sup> Bodily Pain. *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Franklin Printing & Publishing Co. v. Behrens*, 80 Ill. App. 313; *Swarthout v. New Jersey Steamboat Co.*, 46 Barb. (N. Y.) 222. Mental suffering. *GRONAN v. KUKKUCK*, 59 Iowa, 18, 12 N. W. 748, *Cooley, Cas. Damages*, 127; *Ft. Scott, W. & W. Ry. Co. v. Lightburn*, 9 Kan. App. 642, 58 Pac. 1033; *Kennedy v. St. Louis Transit Co.*, 103 Mo. App. 1, 78 S. W. 77; *Gagnier v. City of Fargo*, 12 N. D. 219, 96 N. W. 841; *Brown v. Hannibal & St. J. R. Co.*, 99 Mo. 310, 12 S. W. 655; *Central Railroad & Banking Co. v. Lanier*, 83 Ga. 587, 10 S. E. 279; *Wright v. Compton*, 53 Ind. 337. Loss of memory or impaired mental constitution are not the natural or probable results of mere bodily injuries and must be specially pleaded. *Atchison, T. & S. F. R. Co. v. Willey*, 57 Kan. 764, 48 Pac. 25. See "*Damages*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 410.

<sup>20</sup> *Tomlinson v. Town of Derby*, 43 Conn. 562. See, also, *Wabash Western Ry. Co. v. Friedman*, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111. See "*Damages*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 429-453.

in the declaration, or the plaintiff will not be permitted to give evidence of them at the trial."<sup>21</sup>

An action for malicious prosecution can be sustained only on proof of damage. The law will not presume damage. Accordingly, special damage must be proved, in order to show an actionable wrong, and only such items of damage as are specially pleaded may be shown. Thus, damages for loss of credit or reputation cannot be recovered unless specially pleaded.<sup>22</sup>

Slandorous words spoken of one with reference to his calling are actionable per se. The law presumes damage. Hence damages may be recovered under the general allegation of damage for a general loss or decrease of trade.<sup>23</sup> But loss of particular customers or sales is special damage, and must be alleged.<sup>24</sup> The loss of use of property is a necessary consequence of its wrongful detention, and damages therefor may accordingly be recovered, though not specially pleaded.<sup>25</sup>

<sup>21</sup> *Taylor v. Town of Monroe*, 43 Conn. 36, 46. See, generally, *Hunter v. Stewart*, 47 Me. 419; *Johnson v. Von Kettler*, 84 Ill. 315; *O'Leary v. Rowan*, 31 Mo. 117. Loss of time from business and loss of earnings must be specially pleaded. *Southern R. Co. v. Hawkins*, 121 Ky. 415, 89 S. W. 258; *Union Traction Co. of Indiana v. Sullivan*, 38 Ind. App. 513, 76 N. E. 116; *Zonker v. People's Union Mercantile Co.*, 110 Mo. App. 382, 86 S. W. 486. See "*Damages*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 429-453.

<sup>22</sup> *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59. See, also, *Rowland v. Bellinger*, 3 Strob. (S. C.) 373; *Stanfield v. Phillips*, 78 Pa. 73. See "*Damages*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 429-453.

<sup>23</sup> *Foulger v. Newcomb*, L. R. 2 Exch. 327; *Evans v. Harries*, 1 Hurl. & N. 251. See "*Libel and Slander*," *Dec. Dig. (Key No.)* §§ 89, 100; *Cent. Dig.* §§ 213, 214, 248.

<sup>24</sup> See *HEISER v. LOOMIS*, 47 Mich. 16, 10 N. W. 60, *Cooley, Cas. Damages*, 201; *Chicago West Div. Ry. Co. v. Klauber*, 9 Ill. App. 613; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519. See "*Damages*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 429-453.

<sup>25</sup> *Woodruff v. Cook*, 25 Barb. (N. Y.) 505. Contra, *Adams v. Gardner*, 78 Ill. 568. In trover or replevin, or trespass for the destruction of property, loss of the value of the property is the only damage presumed. Any other damages suffered must be specially pleaded. *Schofield v. Ferrers*, 46 Pa. 438; *Brink v. Fre-off*, 44 Mich. 69, 6 N. W. 94; *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107; *Burrage v. Nelson*, 48 Miss. 237. See "*Damages*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 429-453.

Expenses incurred in an attempt to avoid the consequences of defendant's wrong are special damages, and must be pleaded.<sup>26</sup>

Damages for the direct losses caused by a breach of contract may be recovered, though not specially pleaded. Such damages are the inevitable and necessary result of a breach. Thus, the profit which would have been realized as the direct result of work done at the contract price may be recovered, though not specially alleged.<sup>27</sup> In an action on an injunction or attachment bond, counsel fees incurred in dissolving the injunction or attachment must be specially pleaded.

### PROVINCE OF COURT AND JURY

**96. The measure of damages is a question of law, for the court.**

**97. The amount of damages is a question of fact, to be determined from the evidence by the jury. The jury are bound to follow the measure of damages laid down by the court.**

It has already been stated <sup>28</sup> that in the assessment of damages the general rule is that the measure of damages is a question of law, for the court, and the amount of damages is a question of fact for the jury. It is proposed here to examine more in detail the meaning and application of the general rule. The rule is equally applicable to cases of tort and cases of contract.<sup>29</sup>

<sup>26</sup> *Patten v. Libbey*, 32 Me. 378; *Teagarden v. Hetfield*, 11 Ind. 522. See "*Damages*," *Dec. Dig. (Key No.)* § 160; *Cent. Dig.* §§ 439, 445, 448.

<sup>27</sup> *Burrell v. New York & S. Solar Salt Co.*, 14 Mich. 34. See, also, *Laraway v. Perkins*, 10 N. Y. 371; *Ward v. Smith*, 11 Price, 19; *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283. See "*Damages*," *Dec. Dig. (Key No.)* § 159; *Cent. Dig.* §§ 429-453.

<sup>28</sup> Ante, p. 8.

<sup>29</sup> *Miles v. Miller*, 12 Bush (Ky.) 134; *Warren v. Cole*, 15 Mich. 265; *Camp v. Wabash R. Co.*, 94 Mo. App. 272, 68 S. W. 96; *Miller v. Trustees of Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341. See "*Damages*," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* § 533.

*Pecuniary Injuries*

Where an injury results only in pecuniary damage, the question for the jury is primarily of what items the loss consists, and, secondly, what is the value of the thing lost. Both of these questions must be determined from the evidence, and according to the rule of damages laid down by the court. This is equally true in cases of contracts and cases of torts. "In cases where a rule can be discovered, the jury are bound to adopt it."<sup>80</sup> The only difference between contracts and torts is that in cases of contract the loss is usually wholly pecuniary, while in cases of tort the loss is perhaps quite as often nonpecuniary as otherwise. The items of loss, and the value of the thing lost, must be proved by evidence. Even in cases where the law will presume damage, it will not presume any definite amount of damage, and the jury are not allowed to find substantial damages in the absence of any evidence as to the actual amount.<sup>81</sup> Where no damages are

<sup>80</sup> *Walker v. Smith*, 1 Wash. C. C. 152, Fed. Cas. No. 17,086. See, also, *Miller v. Trustees of Mariners' Church*, 7 Me. 51, 20 Am. Dec. 341, and *Hamlin v. Great Northern Ry. Co.*, 1 Hurl. & N. 408. It is the duty of the court to define the elements of damage, and of the jury to assess them; and when the court fails so to do, but, on the contrary, instructs the jury that they may assess such damages as they think just, and take into consideration as elements of damages any items they think proper, such instruction is erroneous. *Union Pac. Ry. Co. v. Shook*, 3 Kan. App. 710, 44 Pac. 685. See "*Damages*," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 145, 533.

<sup>81</sup> See ante, pp. 30, 100. A default admits plaintiff's right to recover some damages, but not the amount of damages. In the absence of evidence as to the amount, plaintiff recovers only nominal damages. *Chicago & I. R. Co. v. Baker*, 73 Ill. 316. After default there cannot be a verdict for defendant. Nominal damages at least must be given. *Ellis v. State ex rel. James*, 3 Ind. 263. After default in an action for negligence, defendant may show, for the purpose of reducing damages to a nominal sum, that he was not guilty of negligence. *Batchelder v. Bartholomew*, 44 Conn. 494. Where plaintiff claims exemplary damages, and defendant defaults, plaintiff must give evidence of circumstances justifying exemplary damages, or they cannot be given. *Chicago & I. R. Co. v. Baker*, 73 Ill. 316. A demurrer admits all material facts well pleaded, but does not admit the amount of damage. In

proved, a verdict for more than nominal damages will be set aside, unless it is a case where exemplary damages are proper.<sup>32</sup> Where damages will not be presumed, the evidence must show substantial damages, or the verdict must be for defendant. Value cannot always be proved with exactness. The jury necessarily have a certain discretion within the range of the testimony. But, where the verdict is either much greater or much less than the amount proved, it will be set aside.<sup>33</sup>

"Where there is a legal measure of damages the jury must determine the amount as a fact according to that measure, otherwise the law which measures the compensation would be of no avail; and whether they have done so or not, in a given case, may be proximately seen by a comparison of the verdict with the evidence."<sup>34</sup> If the jury disregards the measure of damages given them by the court, or the court instructs them erroneously as to the measure of damages, the verdict may be set aside.<sup>35</sup> Thus, in an action for breach of contract of sale, the ordinary measure of damages is the dif-

the absence of proof, only nominal damages can be recovered. *Crogan v. Schiele*, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88; *Hanley v. Sutherland*, 74 Me. 212. See "*Damages*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 31.

<sup>32</sup> *Pittsburgh, C. & St. L. Ry. Co. v. Dewin*, 86 Ill. 296; *Cochrane v. Tuttle*, 75 Ill. 361; *Oakley Mills Mfg. Co. v. Neese*, 54 Ga. 459; *De Briar v. Minturn*, 1 Cal. 450; *Smith v. Houston*, 25 Ark. 183. See "*Damages*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 31.

<sup>33</sup> *Cassell v. Hays*, 51 Ill. 261; *Ray v. Jeffries*, 86 Ky. 367, 5 S. W. 867; *Jacksonville, T. & K. W. Ry. Co. v. Roberts*, 22 Fla. 324. See "*Damages*," *Dec. Dig. (Key No.)* §§ 127, 128, 220; *Cent. Dig.* §§ 354-356, 563; "*Trial*," *Dec. Dig.* § 333; *Cent. Dig.* §§ 784, 786.

<sup>34</sup> *Suth. Dam.* § 2, cited in *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427. Where a verdict of a jury rests in calculation, and they find excessive damages, a new trial may be granted. *Nutter v. Junction R. Co.*, 13 Ind. 479. See "*Damages*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 563-566; "*Trial*," *Dec. Dig.* § 333; *Cent. Dig.* §§ 784, 786.

<sup>35</sup> It is the duty of the court to set aside a verdict which is palpably against the law as applied to the facts found. *McDonald v. Walter*, 40 N. Y. 551, 553. See, also, *Russell v. Palmer*, 2 Wils. 325. See "*Damages*," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 563-566; "*Trial*," *Dec. Dig.* § 333; *Cent. Dig.* §§ 784, 786.



ference between the contract price and the market value at the time the goods should have been delivered. If the jury disregard this measure, and find a different sum, the verdict will be set aside. What is the contract price, and what is the market value, are questions of fact, to be determined by the jury from the evidence. The jury may adopt as the market value any value between the highest and lowest values testified to, but the value adopted must be sustained by some evidence.<sup>86</sup> Similarly, in an action in tort for the simple conversion of property, the ordinary measure of damages is the value of the property at the time of conversion, with interest. A verdict for any other sum is erroneous.<sup>87</sup>

#### *Nonpecuniary Injuries*

It is where a wrong causes nonpecuniary injuries that the jury have the widest discretion in determining the amount of damages to be awarded,<sup>88</sup> though even here, as will be presently seen, their discretion is not wholly arbitrary. Nonpecuniary injuries most often occur in cases of tort, though they may result from a breach of contract, as, for instance, breach of promise of marriage, or failure to deliver a telegram, resulting in mental suffering. There is no measure of damages possible for physical pain and inconvenience, or mental suffering. The amount of money which shall be considered as compensation for this class of injuries is necessarily left to the sound discretion of the jury. The court can merely instruct them what elements may be considered, and from

<sup>86</sup> See *Lockwood v. Onion*, 56 Ill. 506; *Watson v. Harmon*, 85 Mo. 443, 447; *Nicholson v. Couch*, 72 Mo. 209. See "*Damages*," *Dec. Dig. (Key No.)* § 208; *Cent. Dig.* §§ 533, 534.

<sup>87</sup> See ante, p. 281. In trespass, where the jury fail to give the entire value of the property taken, the verdict will be set aside. *Porteous v. Hazel*, Harp. (S. C.) 332. See "*Damages*," *Dec. Dig. (Key No.)* § 220; *Cent. Dig.* §§ 563-566; "*Trial*," *Dec. Dig. (Key No.)* § 333; *Cent. Dig.* §§ 784, 786.

<sup>88</sup> *McLean v. City of Lewiston*, 8 Idaho, 472, 69 Pac. 478; *Economy Light & Power Co. v. Sheridan*, 103 Ill. App. 145; *Pittsburgh, C. & St. L. Ry. Co. v. Sponier*, 85 Ind. 165; *Warren v. Cole*, 15 Mich. 265; *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 23 Utah, 199, 63 Pac. 812. See "*Damages*," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* §§ 230-232.

their own experience and knowledge they must determine the amount to be awarded.<sup>39</sup>

*Setting Aside Verdicts—Excessive and Inadequate Damages*

The court may set aside a verdict when it is against the weight of evidence, but it is with extreme reluctance that the power is exercised. A verdict will not be disturbed unless it is against the decided preponderance of the evidence, or is based on no evidence whatever.<sup>40</sup> Nor will it be disturbed merely because the jury—one or all of them—have reasoned incorrectly. "If such a doctrine were to prevail, scarcely any verdict will stand. The trial by jury is not founded upon a supposition so absurd as that the whole twelve will reason infallibly from the premises to the conclusion."<sup>41</sup>

Where the damages awarded by a jury are excessive or inadequate, the court, in the exercise of a sound discretion may set the verdict aside. This is substantially on the ground that the verdict is against the evidence. The discretion of the court is not arbitrary. If there is sufficient evidence to support the verdict, it cannot be set aside. When the injury is wholly made up of pecuniary elements, it is usually easy to see whether the damages awarded are supported by the evidence.<sup>42</sup> In many actions of contract the damages may be

<sup>39</sup> The court cannot, merely because the damages are at large, leave the whole matter to the jury. It must instruct them as to the proper measure of damages. The court must decide and instruct the jury in respect to what elements and within what limits damages may be estimated in the particular action. *BALTIMORE & O. R. CO. v. CARR*, 71 Md. 135, 17 Atl. 1052; *Cooley, Cas. Damages*, 204; *Ransom v. New York & E. R. Co.*, 15 N. Y. 415; *Welch v. Ware*, 32 Mich. 77. See "*Damages*," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* §§ 230-232.

<sup>40</sup> See *Perry v. Robinson*, 2 Tex. 490. See "*Damages*," *Dec. Dig. (Key No.)* §§ 127, 128; *Cent. Dig.* §§ 354-356.

<sup>41</sup> Per Maule, J., quoted in *Sedg. Dam.* § 1390.

<sup>42</sup> See *Connelly v. McNeil*, 47 N. C. 51 (where interest was wrongfully allowed); *Havana, R. & E. R. Co. v. Walsh*, 85 Ill. 58 (where a counterclaim was overlooked in estimating damages). See, also, *Toledo, P. & W. R. Co. v. Patterson*, 63 Ill. 304; *Kolb v. O'Brien*, 86 Ill. 310; *Farwell v. Warren*, 70 Ill. 28; *St. Louis, I. M. & S. Ry. Co. v. Hall*, 53 Ark. 7, 13 S. W. 138; *Cram v. Hadley*, 48

calculated with almost mathematical certainty. Accordingly, it is in this class of cases that verdicts are most frequently set aside. But even in cases involving nonpecuniary injuries, where there is no fixed measure of damages, and the amount is necessarily left to the sound discretion of a jury, the court may set aside the finding of the jury. In this class of cases, however, it is with the greatest caution and reluctance that the court will interfere.<sup>43</sup> This is because it is very difficult to say, in this class of cases, that the evidence does not support the verdict. It is only in the clearest cases that the court will disturb the verdict.<sup>44</sup> "In all cases where there is no

N. H. 191. See "*Damages*," *Dec. Dig. (Key No.)* §§ 127, 128; *Cent. Dig. §§ 354-356*; "*New Trial*," *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig. §§ 151-161*.

"It must not be supposed, however, that verdicts in cases of torts are beyond control; but they should stand, unless they are grossly erroneous, or there is a palpable misconception of the testimony, or they are the result, plainly, of passion or prejudice." *City of Ottawa v. Sweely*, 65 Ill. 434, 436. And see *Townsend v. Hughes*, 2 Mod. 150; *Beardmore v. Carrington*, 2 Wils. 244. See, also, *City of Galesburg v. Higley*, 61 Ill. 287; *Scherpf v. Szadeczky*, 4 E. D. Smith (N. Y.) 110; *The Commerce*, 16 Wall. 33, 21 L. Ed. 465; *Murray v. Buell*, 74 Wis. 14, 41 N. W. 1010; *Chicago & N. W. Ry. Co. v. Peacock*, 48 Ill. 253; *Weaver v. Page*, 6 Cal. 681 (15,000 for malicious prosecution sustained); *Barth v. Merritt*, 20 Mo. 567; *Pittsburgh, C. & St. L. Ry. Co. v. Sponier*, 85 Ind. 165; *Ohio & M. Ry. Co. v. Judy*, 120 Ind. 397, 22 N. E. 252; *Wunderlich v. Mayor, etc., of City of New York (C. C.)* 33 Fed. 854; *Goodno v. City of Oshkosh*, 28 Wis. 300; *Tennessee Coal & R. Co. v. Roddy*, 85 Tenn. 400, 5 S. W. 286; *Goetz v. Amba*, 27 Mo. 28. See "*Damages*," *Dec. Dig. (Key No.)* §§ 127, 128; *Cent. Dig. §§ 354-356*; "*New Trial*," *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig. §§ 151-161*.

"Whether or not a verdict is excessive must depend upon the facts of each case. Thus, in *Missouri Pac. Ry. Co. v. Peay*, 7 Tex. Civ. App. 400, 26 S. W. 768, \$4,000 was held not excessive for ejection from a car. But in *Hardenbergh v. St. Paul, M. & M. Ry. Co.*, 41 Minn. 200, 42 N. W. 933, \$800 was held excessive for ejection, and \$400 was ordered remitted. \$25,000 is not excessive for injuries to a child. *Dunn v. Burlington, C. R. & N. Ry. Co.*, 35 Minn. 73, 27 N. W. 448. Nor to a man rendered a hopeless cripple for life. *Hall v. Chicago B. & N. R. Co.*, 46 Minn. 439, 49 N. W. 239; *Willard v. Holmes, Booth & Haydens*, 2 Misc. Rep. 303, 21 N. Y. Supp. 998. A verdict for \$60,000 for false im-

rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice,

prisonment lasting 35 days was held excessive. *Kilbourn v. Thompson*, 1 MacAr. & M. (D. C.) 401. In *Smith v. Whittier*, 95 Cal. 279-283, 30 Pac. 529, will be found a collection of small verdicts, and at page 284, 95 Cal., and page 529, 30 Pac., of large verdicts. In the following cases verdicts have been held not excessive: Knee hurt, but external recovery, \$5,000, *Cogswell v. West St. & N. E. Electric Ry. Co.*, 5 Wash. 46, 31 Pac. 411. Broken rib and roughened pleura, \$500, *Evans v. City of Huntington*, 37 W. Va. 601, 16 S. E. 801. Broken thigh, \$2,000, *McDowell v. The France* (D. C.) 53 Fed. 843. Collar bone broken and other injuries, \$7,500, *Galveston, H. & S. A. R. Co. v. Wesch* (Tex. Civ. App.) 21 S. W. 313. Right arm and shoulder, \$15,000, *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 30 Pac. 601. Displacement of womb, \$15,000, *City of Chicago v. Leseth*, 43 Ill. App. 480. Helpless invalid for life, \$15,000, *Sears v. Seattle Consolidated St. Ry. Co.*, 6 Wash. 227, 33 Pac. 389, 1081. Spinal injury, \$3,000, *Wabash W. Ry. Co. v. Friedman*, 41 Ill. App. 270 (reversed on another point 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111). Finger of left hand, \$2,750, *Haynes v. Erk*, 6 Ind. App. 332, 33 N. E. 637. Permanent injury to lung, \$5,000, *Fordyce v. Culver*, 2 Tex. Civ. App. 569, 22 S. W. 237. Broken leg, thereafter stiff and short, \$5,000, *Town of Fowler v. Linquist*, 138 Ind. 566, 37 N. E. 133; \$6,500, *Selleck v. J. Langdon Co.*, 59 Hun, 627, 13 N. Y. Supp. 858. Broken skull, crushed hip, and damaged urinary organs, \$15,000, *Texas & P. Ry. Co. v. Hohn*, 1 Tex. Civ. App. 36, 21 S. W. 942. Fracture of hip, woman of 60, \$5,000, *City of Kansas City v. Manning*, 50 Kan. 373, 31 Pac. 1104. Loss of limbs by woman, \$23,000, *Erickson v. Brooklyn Heights Ry. Co.*, 11 Misc. Rep. 662, 32 N. Y. Supp. 915. Injury to eyes, ears, shoulder, and arm, \$3,000, *Sabine & E. T. Ry. Co. v. Ewing*, 1 Tex. Civ. App. 531, 21 S. W. 700. Loss of eyes, \$10,000, *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464. Amputation of left arm, etc., \$10,000, *Baltzer v. Chicago, M. & N. R. Co.*, 89 Wis. 257, 60 N. W. 716. In cases of willful violence, \$9,000, *Townsend v. Briggs* (Cal.) 32 Pac. 307; \$2,000, *Wohlemberg v. Melchert*, 35 Neb. 803, 53 N. W. 982. Arm, \$10,000, *Flanders v. Chicago St. P., M. & O. Ry. Co.*, 51 Minn. 193, 53 N. W. 544. Loss of leg, \$25,000, *Ehrman v. Brooklyn City R. Co.*, 131 N. Y. 576, 30 N. E. 67. Libel, \$45,000, *Smith v. Times Co.*, 4 Pa. Dist. R. 399. The following verdicts have been held excessive: Foot, \$12,000, *Kroener v. Chicago M. & St. R. Ry. Co.*, 88 Iowa, 16, 55 N. W.

or have been misled by some mistaken view of the merits of the case.”<sup>45</sup> The court, in setting aside a verdict for excessive damages, should clearly see that they are excessive; that there has been a gross error; that there has been a mistake of the principles upon which the damages have been estimated, or that some improper motive or feelings or bias has influenced the minds of the jury.<sup>46</sup> Upon a mere matter of damages, where different minds might well arrive at different conclusions, and there is nothing inconsistent with an honest exercise of judgment, the verdict of the jury should not be disturbed.<sup>47</sup> “A court of law will not set aside a verdict, upon the ground of excessive damages, unless in a clear case, where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence or bias, or have

28; \$3,000, *Kennedy v. St. Paul City Ry. Co.*, 59 Minn. 45, 60 N. W. 810. Two fingers, \$5,000, *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866. Fracture of smaller bone of ankle, \$1,100, *Bronson v. Forty-Second St., M. & St. N. A. Ry. Co.*, 67 Hun, 649, 21 N. Y. Supp. 695; *Louisville & N. R. Co. v. Survant*, 96 Ky. 197, 27 S. W. 999. Amputation of first joint of left thumb, \$2,000, *Louisville & N. R. Co. v. Law*, 21 S. W. 648, 14 Ky. Law Rep. 850. In case of willful violence, \$5,000, *Roades v. Larson*, 66 Hun, 635, 21 N. Y. Supp. 855. For dishonor of a check, \$450, *Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 127, 128; *Cent. Dig.* §§ 354-356; “*New Trial*,” *Dec. Dig. (Key No.)* §§ 75-77, *Cent. Dig.* §§ 151-161.

“*Worster v. Proprietors of Canal Bridge Co.*, 16 Pick. (Mass.) 541. And see *Whitman v. Leslie*, 54 How. Prac. (N. Y.) 494; *Jones v. New York Cent. & H. R. R. Co.*, 99 App. Div. 1, 90 N. Y. Supp. 422. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 127, 128; *Cent. Dig.* §§ 354-356; “*New Trial*,” *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig.* §§ 151-161.

“*Peterson v. Western Union Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; *Louisville & N. R. Co. v. Whitley County Court*, 49 S. W. 332, 20 Ky. Law Rep. 1367. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 127, 128; *Cent. Dig.* §§ 354-356; “*New Trial*,” *Dec. Dig. (Key No.)* §§ 75-77.

“*Thurston v. Martin*, 5 Mason, 497, Fed. Cas. No. 14,018; *Gilbert v. Berkinshaw*, Loft. 771; *Price v. Severn*, 7 Bing. 316; *Retan v. Lake Shore & M. S. Ry. Co.*, 94 Mich. 146, 53 N. W. 1094. See “*Damages*,” *Dec. Dig. (Key No.)* §§ 127, 128, 208; *Cent. Dig.* §§ 354-356, 533; “*New Trial*,” *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig.* §§ 151-161.

disregarded the law."<sup>48</sup> "The rule so carefully maintained and guarded in actions upon contracts, and for tortious injuries to property, is incapable of being applied when the injury is to the person, for those injuries are without precise pecuniary measure. The law has, accordingly, in this class of cases, committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And, where the verdict rendered by them may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the court is, and necessarily must be, not to interfere with their conclusion."<sup>49</sup>

Where the damages found by a jury are inadequate the verdict will be set aside, on the same principles that apply when the damages are excessive.<sup>50</sup> It has been held that in actions of tort, as a general rule, the verdict will not be set aside because the damages were too small.<sup>51</sup> But the rule is now established otherwise.<sup>52</sup> "A verdict for a grossly inadequate

\* *Wiggin v. Coffin*, 3 Story, 1, Fed. Cas. No. 17,624. See, also, *Gilbert v. Burtenshaw*, Cowp. 230; *Whipple v. Cumberland Mfg. Co.*, 2 Story, 661, Fed. Cas. No. 17,516; *Harris v. Louisville, N. O. & T. R. (C. C.) Co.*, 35 Fed. 116. See "New Trial," *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig.* §§ 151-161.

\* *Walker v. Erie R. Co.*, 63 Barb. 260, 267. A verdict considerably lower than the outside range of the testimony would have warranted is not excessive. *Balch v. Grand Rapids & I. R. Co.*, 78 Mich. 654, 44 N. W. 151. Damages not exceeding the demand of the complaint and fairly within a credible part of the testimony are not necessarily excessive, though they exceed the plaintiff's own estimate. *Einolf v. Thomson*, 95 Minn. 230, 103 N. W. 1026, affirmed on reargument 104 N. W. 547. See "Damages," *Dec. Dig. (Key No.)* §§ 96, 208; *Cent. Dig.* §§ 230-232.

\* *TATHWELL v. CITY OF CEDAR RAPIDS*, 122 Iowa, 50, 97 N. W. 96, Cooley, Cas. Damages, 205. See "New Trial," *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig.* §§ 151-161.

\* *Cook v. Beale*, 1 Ld. Raym. 176; *Howard v. Barnard*, 11 C. B. 653; *Hayward v. Newton*, 2 Strange, 940; *Lord Townsend v. Hughes*, 2 Mod. 150; *Barker v. Dixie*, 2 Strange, 1051. Cf. *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265; See "New Trial," *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig.* §§ 151-161.

\* *TATHWELL v. CITY OF CEDAR RAPIDS*, 122 Iowa, 50, 97 N. W. 96, Cooley, Cas. Damages, 205; *Robinson v. Town of*

amount stands upon no higher ground in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But, when the case does plainly show the result, justice as plainly forbids that the plaintiff should be denied what is his due as that the defendant should pay what he ought not to be charged."<sup>53</sup> It was accordingly held that a verdict for the plaintiff for a sum far less than he was entitled to recover under any evidence in the case, provided he was entitled to recover at all, would be set aside, on application of the plaintiff, although, upon the evidence, a verdict for the defendant would not have been disturbed.<sup>54</sup>

Where the verdict is excessive the plaintiff may frequently cure the error by remitting the excess. Where an item of damage has been erroneously included in the estimate by the jury, the error may be cured by remitting the amount allowed

Waupaca, 77 Wis. 544, 46 N. W. 809; Pritchard v. Hewitt, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265; Watson v. Harmon, 85 Mo. 443; Caldwell v. Vicksburg, S. & P. R., 41 La. Ann. 624, 6 South. 217; Phillips v. London & S. W. R. Co., L. R. 4 Q. B. Div. 406. See "New Trial," *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig.* §§ 151-161.

<sup>53</sup> McDonald v. Walter, 40 N. Y. 551, 554. See "Damages," *Dec. Dig. (Key No.)* §§ 128-132; *Cent. Dig.* §§ 370, 396; "New Trial," *Dec. Dig. (Key No.)* § 75; *Cent. Dig.* §§ 151, 152.

<sup>54</sup> McDonald v. Walter, 40 N. Y. 551. A verdict awarding nominal damages for a serious personal injury will be set aside. Carpenter v. City of Red Cloud, 64 Neb. 126, 89 N. W. 637; Tooker v. Brooklyn Heights R. Co., 80 App. Div. 371, 80 N. Y. Supp. 969; Beattie v. Moore, L. R. 2 Ir. 2; Robbins v. Hudson R. R. Co., 7 Bosw. (N. Y.) 1; Falvey v. Stanford, L. R. 10 Q. B. 54. Cf. Richards v. Rose, 9 Exch. 218. See, also, Richards v. Sandford, 2 E. D. Smith (N. Y.) 349; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123 (interest added on appeal); Howard v. Barnard, 11 C. B. 653. In Phillips v. Railway Co., 5 Q. B. Div. 78, a verdict for £7,000 was set aside as inadequate. On the second trial a verdict for £16,000 was held not excessive. 5 C. P. Div. 280. See "Damages," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 372-385; "New Trial," *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig.* §§ 151-161.

for such item, provided it can be definitely ascertained;<sup>56</sup> otherwise not.<sup>56</sup> In the case of nonpecuniary injuries, where the verdict of the jury is final, unless it shows that the jury were influenced by partiality, prejudice, or passion, the plaintiff has been permitted to remit enough to prevent the verdict from being excessive.<sup>57</sup> It is a common practice for both trial and appellate courts to indicate the amount by which they deem the verdict excessive, and require the plaintiff to remit it, as a condition of refusing a new trial. The question has been raised whether this practice does not deprive the parties of the right to trial by jury, and also that it is an invasion of the province of the jury,<sup>58</sup> but the practice is supported by the weight of authority.<sup>59</sup>

<sup>56</sup> Toledo, W. & W. Ry. Co. v. Beals, 50 Ill. 150; Strong v. Hooe, 41 Wis. 659; Kavannaugh v. City of Janesville, 24 Wis. 618; Evertson v. Sawyer, 2 Wend. (N. Y.) 507; Howard v. Grover, 28 Me. 97, 48 Am. Dec. 478; Lambert v. Craig, 12 Pick. (Mass.) 199; King v. Howard, 1 Cush. (Mass.) 137; Pendleton St. R. Co. v. Rahmann, 22 Ohio St. 446. Cf. Kennon v. Gilmer, 131 U. S. 32, 9 Sup. Ct. 696, 33 L. Ed. 110. See "Damages," Dec. Dig. (Key No.) § 228; Cent. Dig. §§ 576-579.

<sup>57</sup> Pavey v. American Ins. Co., 56 Wis. 221, 13 N. W. 925; Smith v. Dukes, 5 Minn. 373 (Gil. 301). See, also, St. Louis, I. M. & Ry. Co. v. Hall, 53 Ark. 7, 13 S. W. 138; Hodapp v. Sharp, 40 Cal. 69; Lambert v. Craig, 12 Pick. (Mass.) 199. See "Damages," Dec. Dig. (Key No.) § 228; Cent. Dig. §§ 576-579.

<sup>58</sup> Blunt v. Little, Fed. Cas. No. 1,578, 3 Mason, 102; Tucker v. Hyatt, 151 Ind. 332, 51 N. E. 469, 44 L. R. A. 129; Independent Order of Mutual Aid v. Stahl, 64 Ill. App. 314; Wainwright v. Satterfield, 52 Neb. 403, 72 N. W. 359; Everett v. Akins, 8 Okl. 184, 56 Pac. 1062; DAVIS v. BOWERS GRANITE CO., 75 Vt. 226, 54 Atl. 1084, Cooley, Cas. Damages, 199. See "Appeal and Error," Dec. Dig. (Key No.) § 1140; Cent. Dig. §§ 4462-4478; "Damages," Dec. Dig. (Key No.) § 228; Cent. Dig. §§ 576-579; "New Trial," Dec. Dig. (Key No.) § 162; Cent. Dig. §§ 324-329.

<sup>59</sup> See dissenting opinions in Burdict v. Missouri Pac. Ry. Co., 133 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528. See, also, Suth. Dam. § 460; Sherry v. Frecking, 4 Duer (N. Y.) 452; Koeltz v. Bleckman, 46 Mo. 320; Lesson v. Smith, 4 Nev. & Man. 304; Savannah, F. & W. Ry. v. Harper, 70 Ga. 119; Carlisle v. Callahan, 78 Ga. 320, 2 S. E. 751; Craig v. Cook, 28 Minn. 238, 9 N. W. 712; Potter v. Chicago & N. W. R. Co., 22 Wis. 615. See "Jury," Dec. Dig. (Key No.) § 31; Cent. Dig. § 211; "New Trial," Dec. Dig. (Key No.) § 228; Cent. Dig. §§ 324-329.

<sup>60</sup> Baker v. City of Madison, 62 Wis. 137, 22 N. W. 141, 583; Pratt



*Exemplary Damages*

It is a question for the court to determine whether there is any evidence to support a verdict for exemplary damages.<sup>60</sup> It is a question for the jury to determine whether exemplary damages shall be awarded.<sup>61</sup> It is error to instruct the jury to give exemplary damages.<sup>62</sup> It is error to submit the ques-

v. Pioneer Press Co., 35 Minn. 251, 28 N. W. 708; Hutchins v. St. Paul, M. & M. Ry. Co., 44 Minn. 5, 46 N. W. 79; Durkes v. Town of Union, 38 N. J. Law, 21; Missouri Pac. Ry. Co. v. Dwyer, 36 Kan. 58, 12 Pac. 352; Hopkins v. Orr, 124 U. S. 510, 8 Sup. Ct. 590, 31 L. Ed. 523; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; Gibson v. Talbotton R. Co., 112 Ga. 325, 37 S. E. 365; Doyle v. Edwards, 15 S. D. 648, 91 N. W. 322; Buena Vista Co. v. McCandlish, 92 Va. 297, 23 S. E. 781; Sills v. Hawes, 14 Colo. App. 157, 59 Pac. 422; Detzur v. B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500; Upham v. Dickinson, 50 Ill. 97; Johnson v. VonKettler, 66 Ill. 63; Duffy v. City of Dubuque, 63 Iowa, 171, 18 N. W. 900, 50 Am. Rep. 743; Collins v. City of Council Bluffs, 35 Iowa, 432; Hegeman v. Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517; Diblin v. Murphy, 3 Sandf. (N. Y.) 19; Whitehead v. Kennedy, 69 N. Y. 462, 470; Spicer v. Chicago & N. W. Ry. Co., 29 Wis. 580; Holmes v. Jones, 121 N. Y. 461, 24 N. E. 701; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Patten v. Chicago & N. W. Ry. Co., 32 Wis. 524; Baker v. City of Madison, 62 Wis. 137, 22 N. W. 141, 583; Van Winter v. Henry Co., 61 Iowa, 684, 17 N. W. 94; Lombard v. Chicago R. I. & P. R. Co., 47 Iowa, 494; Johnston v. Morrow, 60 Mo. 339. See Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880. See "Jury," Dec. Dig. (Key No.) § 31; Cent. Dig. § 211; "New Trial," Dec. Dig. (Key No.) § 162; Cent. Dig. §§ 324-329.

\* Philadelphia Traction Co. v. Orbann, 119 Pa. 37, 12 Atl. 816; Pittsburgh Southern Ry. Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580; Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Selden v. Cashman, 20 Cal. 56, 81 Am. Dec. 93. See "Damages," Dec. Dig. (Key No.) § 208; Cent. Dig. §§ 205, 220.

\* Nagle v. Mullison, 34 Pa. 48; Graham v. Pacific R. Co., 66 Mo. 536; Chicago, St. L. & N. O. Ry. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; Johnson v. Smith, 64 Me. 553; Smith v. Thompson, 55 Md. 5, 39 Am. Rep. 409; Pratt v. Pond, 42 Conn. 318; Dye v. Denham, 54 Ga. 224. See "Damages," Dec. Dig. (Key No.) § 208; Cent. Dig. §§ 205, 220.

\* Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296; Hawk v. Ridgway, 33 Ill. 473; New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689; Southern R. Co. v. Kendrick, 40

tion to them where there is no evidence to support a verdict for exemplary damages.<sup>63</sup>

A verdict for exemplary damages may be set aside when it is clearly excessive.<sup>64</sup> The court proceeds on the same principle as in other cases of excessive damages. The verdict will be set aside only when it is grossly excessive, or the jury acted under the influence of passion, prejudice, or some other improper motive.<sup>65</sup>

Miss. 374, 90 Am. Dec. 332; *Louisville & N. R. Co. v. Brooks'* Adm'x, 83 Ky. 129, 4 Am. St. Rep. 135; *Boardman v. Goldsmith*, 48 Vt. 403; *Snow v. Carpenter*, 49 Vt. 426. Contra, *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565. An instruction that "this is one of the cases where they may give exemplary damages" was held erroneous, where the facts were in dispute. *Pickett v. Cook*, 20 Wis. 358. Under Code Iowa, § 1557, providing that the person injured in her means of support by the intoxication of another shall have a right of action, against the person selling the liquor, "for all damages actually sustained, as well as exemplary damages," it was held proper to instruct the jury that, if plaintiff was entitled to actual damages, it was their duty to add thereto an amount as exemplary damages. *Thill v. Pohlman*, 76 Iowa, 638, 41 N. W. 385. See, also, *Fox v. Wunderlich*, 64 Iowa, 187, 20 N. W. 7. So an instruction that, if an assault was accomplished by certain aggravating circumstances, the jury ought to give exemplary damages, was held not erroneous. *Hooker v. Newton*, 24 Wis. 292. An instruction that the jury cannot give vindictive damages "unless they believe, from the evidence, that the defendants maliciously entered upon plaintiff's land in a rude, aggravating, or insulting manner," is erroneous, because it improperly restricts the standard of liability. *Devaughn v. Heath*, 37 Ala. 595. See "*Damages*," Dec. Dig. (Key No.) § 208; *Cent. Dig.* §§ 205, 220.

<sup>63</sup> See cases cited in note 60, ante.

<sup>64</sup> With this limitation, the amount of exemplary damages is discretionary with the jury. *Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152. See "*Appeal and Error*," Dec. Dig. (Key No.) § 1004; *Cent. Dig.* §§ 3944-3947; "*New Trial*," Dec. Dig. (Key No.) §§ 76, 77; *Cent. Dig.* §§ 153-161.

<sup>65</sup> *Cutler v. Smith*, 57 Ill. 252; *Farwell v. Warren*, 70 Ill. 28; *Collins v. City of Council Bluffs*, 35 Iowa, 432; *Goetz v. Ambts*, 27 Mo. 28; *Rogers v. Henry*, 32 Wis. 327; *Bohland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Flannery v. Baltimore & O. R. Co.*, 4 Mackey (D. C.) 111. See, also, *Bryan v. Acee*, 27 Ga. 87; *Willis v. McNeill*, 57 Tex. 465. In *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785, a verdict of \$4,500

**CHAPTER IX****BREACH OF CONTRACT FOR SALE OF GOODS**

- 98-100. Action by Seller—Where Property has Not Passed—Damages for Nonacceptance.
- 101. Where Property has Passed—Damages for Nonpayment.
- 102-103 Action by Buyer—Damages for Nondelivery.
- 104. Damages as for Conversion.
- 105. Damages for Breach of Warranty.

**ACTION BY SELLER—WHERE PROPERTY HAS NOT PASSED—DAMAGES FOR NONACCEPTANCE**

- 98. If the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.
- 99. Where the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed.
- 100. The measure of damages for nonacceptance is the estimated loss directly and naturally resulting from the breach of contract in the natural course of events, and, when there is an available market for the goods, is prima

against a railroad company for carrying plaintiff 400 yards beyond a station and refusing to return was sustained. In *Burkett v. Lanata*, 15 La. Ann. 337, it is said: "Exemplary damages should nevertheless be commensurated to the nature of the offense, and when extravagant damages are allowed they will be reduced to their proper standard." See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1004; *Cent. Dig.* §§ 3944-3947; "*New Trial*," *Dec. Dig. (Key No.)* §§ 76, 77; *Cent. Dig.* §§ 153-161.

**facie to be ascertained by the difference between the contract price and the market price at the agreed time and place of delivery.**

When the property in the goods has not passed, as where the contract is for the sale of unascertained goods or of goods which are not in a deliverable state, the buyer's breach of his promise to accept and pay for them can only affect the seller by way of damages. The goods are still his. He may resell them or not, at his pleasure. His only remedy, therefore, is an action against the buyer for nonacceptance.<sup>1</sup> To this general rule there is only the one exception, which has been above stated, that, if by the terms of the contract the price is payable irrespective of delivery, the seller may sue for the price at the time agreed upon, leaving the buyer to his cross action in case the seller, after receiving the price, should fail to deliver the goods.<sup>2</sup>

*Damages for Nonacceptance*

The proper measure of damages for nonacceptance is generally the difference between the contract price and the market price at the place of delivery at the time when the contract is broken, because the seller may take his goods into the market, and obtain the current price for them.<sup>3</sup> If the goods

<sup>1</sup>Collins v. Delaporte, 115 Mass. 159, 162; Gordon v. Norris, 49 N. H. 376; Danforth v. Walker, 37 Vt. 239; Atwood v. Lucas, 53 Me. 508, 89 Am. Dec. 713; Brand v. Henderson, 107 Ill. 141; Ganson v. Madigan, 13 Wis. 68; Chapman v. Ingram, 30 Wis. 290, 294; Peters v. Cooper, 95 Mich. 191, 54 N. W. 694; Benj. Sales, § 758. See "Sales," Dec. Dig. (Key No.) §§ 340, 369; Cent. Dig. §§ 927-942, 1083, 1084.

<sup>2</sup>Dunlop v. Grote, 2 Car. & K. 153. See "Sales," Dec. Dig. (Key No.) § 340; Cent. Dig. §§ 927-942.

<sup>3</sup>Murray v. Doud, 167 Ill. 368, 47 N. E. 717, 59 Am. St. Rep. 297; Houghton v. Furbush, 185 Mass. 251, 70 N. E. 49; Saveland v. Western Wisconsin R. Co., 118 Wis. 267, 95 N. W. 130; Minnesota Threshing Mach. Co. v. McDonald, 10 N. D. 408, 87 N. W. 993; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; Cherry Valley Iron Works v. Florence Iron River Co., 12 C. C. A. 306, 64 Fed. 569; Gray v. Central R. Co. of New Jersey, 82 Hun, 523, 31 N. Y. Supp. 704; Kellogg v. Frohlich, 139 Mich. 612, 102

have no market price, the damages must, of course, be otherwise ascertained;<sup>4</sup> and if they have no money value the measure of damages would be equal to the whole contract price.<sup>5</sup> The date at which the contract is deemed to be broken is that fixed by the contract for the delivery, and not that at which the buyer may give notice that he intends to break the contract and refuse accepting the goods.<sup>6</sup> If the contract is for the sale of goods to be manufactured, or otherwise procured by the seller, and the buyer refuses to accept or gives notice that he intends to refuse acceptance, so that

N. W. 1057; *Allen v. Jarvis*, 20 Conn. 38; *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140. See "Sales," *Dec. Dig. (Key No.)* § 384; *Cent. Dig.* §§ 1098-1107.

<sup>4</sup>*Chicago v. Greer*, 9 Wall. 726, 19 L. Ed. 769; *Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. 444, 20 C. C. A. 503; *Indiana Canning Co. v. Priest*, 16 Ind. App. 445, 45 N. E. 618; *McCormick v. Hamilton*, 23 Grat. (Va.) 561; *TODD v. GAMBLE*, 148 N. Y. 382, 42 N. E. 982, 25 L. R. A. 225, *Cooley, Cas. Damages*, 210. Where there was no market, the proper measure of damages was the actual loss which the sellers, acting as reasonable men in the ordinary course of business, had sustained. *Dunkirk Colliery Co. v. Lever*, 9 Ch. Div. 20, 25. Where an article has no market value, an investigation into the constituent elements of the cost to the party who contracted to furnish it becomes necessary, and that cost, compared with the contract price, will afford the measure of damages. *Masterton v. Mayor, etc.*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38. If there is no market at the place of delivery, the market price at the nearest market may be taken; allowance being made for the cost of transportation. See ante, p. 272. See "Sales," *Dec. Dig. (Key No.)* § 384; *Cent. Dig.* §§ 1098-1107.

<sup>5</sup>*Allen v. Jarvis*, 20 Conn. 38. Cf. *Chicago v. Greer*, 9 Wall. 726, 19 L. Ed. 726. See "Sales," *Dec. Dig. (Key No.)* § 384, *Cent. Dig.* §§ 1098-1107.

<sup>6</sup>*Rhodes v. Cleveland Rolling Mill Co. (C. C.)* 17 Fed. 426; *Boorman v. Nash*, 9 Barn. & C. 145; *Phillpotts v. Evans*, 5 Mees. & W. 475; *Thompson v. Alger*, 12 Metc. (Mass.) 428, 443; *Schramm v. Boston Sugar-Refining Co.*, 146 Mass. 211, 15 N. E. 571; *Gordon v. Norris*, 49 N. H. 376; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Camp v. Hamlin*, 55 Ga. 259; *Williams v. Jones*, 1 Bush (Ky.) 621; *Pittsburgh, C. & St. L. Ry. Co. v. Heck*, 50 Ind. 303; *Sanborn v. Benedict*, 78 Ill. 309; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548. Compare *Smith v. Snyder*, 77 Va. 432. See "Sales," *Dec. Dig. (Key No.)* § 384; *Cent. Dig.* §§ 1098-1107.

the seller is excused from procuring and tendering the goods, he will be entitled to such damages as will put him in the same position as if he had been permitted to complete the contract.<sup>7</sup> Thus where the contract was for the sale of rails to be rolled by the seller, "and to be drilled as he may be directed," at \$58 per ton, and the buyer refused to give directions for drilling, and at his request the seller delayed rolling until after the time prescribed for their delivery, and then the buyer advised the seller that he should decline to take any of the rails under the contract, it was held that the seller was not bound to roll the rails and tender them, and that the proper rule of damages was the difference between the cost per ton of making and delivering the rails and \$58.<sup>8</sup>

Where the contract is for the sale of a chattel to be made to order, there is a conflict of authority as to whether the property passes on completion, or whether acceptance by the buyer is essential to the appropriation,<sup>9</sup> and in such cases, whether an action can be maintained for the price or whether the seller is confined to an action for damages for nonacceptance will depend on the rule adopted in the particular jurisdiction as to what is necessary to transfer the property.

<sup>7</sup> *American Bridge and Contract Co. v. Bullen Bridge Co.*, 29 Or. 549, 46 Pac. 138; *ROEHM v. HORST*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, *Cooley, Cas. Damages*, 81; *Cort v. Ambergate N. & B. & E. J. Ry. Co.*, 17 Q. B. 127, 20 Law J. Q. B. 460; *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *United Engineering and Contracting Co. v. Broadnax*, 136 Fed. 351, 69 C. C. A. 177; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Muskegon Curtain-Roll Co. v. Keystone Manuf'g Co.*, 135 Pa. 132, 19 Atl. 1008; *Hosmer v. Wilson*, 7 Mich. 295, 74 Am. Dec. 716; *Haskell v. Hunter*, 23 Mich. 305; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648. See, also, *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313. See "Sales," *Dec. Dig. (Key No.)* § 384; *Cent. Dig.* §§ 1098-1107.

<sup>8</sup> *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967. See "Sales," *Dec. Dig. (Key No.)* § 384; *Cent. Dig.* §§ 1098-1107.

<sup>9</sup> See *Tiffany, Sales* (2d Ed.) p. 160. See "Sales," *Dec. Dig. (Key No.)* § 214; *Cent. Dig.* §§ 571-573.

**SAME—WHERE PROPERTY HAS PASSED—DAM-  
AGES FOR NONPAYMENT**

- 101. Where, under a contract of sale, the property in the goods has passed to the buyer, and he wrongfully neglects or refuses to pay for them according to the terms of the contract, the seller may maintain an action against him for the price of the goods.**

When the property in the goods has passed, unless the sale is on credit or payment is made to depend on some contingency, the seller may maintain an action for the price.<sup>10</sup> If the sale is on credit, he must, of course, await the termination of the credit before bringing suit.<sup>11</sup> And if the price is payable by a bill or other security, and the security is not given, the seller cannot sue for the price until the bill would have matured, though he may sue at once for damages for breach of the agreement, in which case the measure of his damages will be *prima facie* the amount of the sum to be secured.<sup>12</sup>

<sup>10</sup> *Tiffany, Sales* (2d Ed.) 345; *Olcese v. Fruit & Trading Co.* 211 Ill. 539, 71 N. E. 1084; *Stearns v. Washburn*, 7 Gray (Mass.) 187, 189; *Morse v. Sherman*, 106 Mass. 430; *Frazier v. Simmons*, 139 Mass. 531, 535, 2 N. E. 112; *Hayden v. Demets*, 53 N. Y. 426; *Doremus v. Howard*, 23 N. J. Law, 390; *Armstrong v. Turner*, 49 Md. 589; *Ganson v. Madigan*, 13 Wis. 67. When the buyer refuses to accept the goods, the seller, if he makes a proper tender, may maintain an action for the price. *White v. Solomon*, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537. See "*Sales*," *Dec. Dig. (Key No.)* § 340; *Cent. Dig.* §§ 927-942.

<sup>11</sup> *Daniels v. Osborn*, 71 Ill. 169; *Tatum v. Ackerman*, 148 Cal. 357, 83 Pac. 151, 3 L. R. A. (N. S.) 908, 113 Am. St. Rep. 276; *Keller v. Strasburger*, 90 N. Y. 379; *Dellone v. Hull*, 47 Md. 112. Mere insolvency of one of the parties is not equivalent to a rescission or a breach. It simply relieves the seller from his agreement to give credit. *Pardee v. Kanady*, 100 N. Y. 121, 126, 2 N. E. 885. Cf. *New England Iron Co. v. Gilbert El. R. Co.*, 91 N. Y. 163, 168. See "*Sales*," *Dec. Dig. (Key No.)* §§ 345, 350; *Cent. Dig.* §§ 956-961, 988-992.

<sup>12</sup> *Paul v. Dod*, 2 C. B. 800; *Rinehart v. Olwine*, 5 Watts & S. (Pa.) 157; *Hanna v. Mills*, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216;

In England it is held that the seller is not entitled, under any circumstances, to rescind the contract for default in the payment of the price;<sup>13</sup> but in this country it has been frequently declared that the unpaid seller, who is in possession of the goods, has, among other remedies, the right to keep the goods as his own, and recover the difference between the market price at the time and place of delivery and the contract price.<sup>14</sup>

### ACTION BY BUYER—DAMAGES FOR NONDELIVERY

**102. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for nondelivery.**

**103. The measure of damages is the estimated loss directly and naturally resulting from the seller's breach of contract, and, when there is an available market for the goods in question, is prima facie to be ascertained by the difference between the contract price and the market price of the goods at the agreed time and place of delivery.**

The breach of contract of which the buyer complains may arise from the seller's default in delivering the goods, or from

*Barron v. Mullin*, 21 Minn. 374. But see *Foster v. Adams*, 60 Vt. 392, 15 Atl. 169, 6 Am. St. Rep. 120. See "*Sales*," *Dec. Dig. (Key No.)* § 384; *Cent. Dig.* §§ 1098-1107.

<sup>13</sup> *Martindale v. Smith*, 1 Q. B. 389.

<sup>14</sup> *Dustan v. McAndrew*, 44 N. Y. 73; *Hayden v. Demets*, 53 N. Y. 426; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; *Barr v. Logan*, 5 Har. (Del.) 52; *Young v. Mertens*, 27 Md. 114, 126; *Cook v. Brandeis*, 3 Metc. (Ky.) 555; *Bagley v. Findlay*, 82 Ill. 524; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535. See, also, *Putnam v. Glidden*, 159 Mass. 47, 34 N. E. 81, 38 Am. St. Rep. 394. See "*Sales*," *Dec. Dig. (Key No.)* §§ 99, 371; *Cent. Dig.* §§ 264, 1086-1088.



some defect in the goods delivered. There may be a breach of the principal contract for the transfer of the property and the delivery of possession or of a collateral contract of warranty.

*Damages for Nondelivery*

Before the property has been transferred to the buyer, his only remedy is an action for breach of contract. If he has paid the price, and the goods are not delivered, he may rescind the contract, and recover what he has paid upon an implied contract in an action for money had or received.<sup>15</sup> If he has not paid the price, his only remedy, where the seller fails to deliver, is to sue for damages for breach of the contract. His position is the converse of that of the seller who is suing the buyer for nonacceptance. He has the money in his hands, and may go into the market and buy. The loss which he sustains by the nondelivery of the goods is therefore, under ordinary circumstances, simply the difference between the contract price and the market price of the goods at the time and place of delivery, and this is the measure of his damages.<sup>16</sup>

<sup>15</sup> *Tiffany Sales* (2d Ed.) 361; *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Cleveland v. Sterrett*, 70 Pa. 204. See "*Sales*," *Dec. Dig. (Key No.)* §§ 390, 391; *Cent. Dig.* §§ 1109-1127.

<sup>16</sup> *Barrow v. Arnaud*, 8 Q. B. 604; *Gainesford v. Carroll*, 2 Barn. & C. 624; *Shaw v. Nudd*, 8 Pick. (Mass.) 9; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Fessler v. Love*, 48 Pa. 407; *Kribs v. Jones*, 44 Md. 396; *Miles v. Miller*, 12 Bush (Ky.) 134; *McKercher v. Curtis*, 35 Mich. 478; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. 49; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; *Saxe v. Lumber Co.*, 159 N. Y. 371, 54 N. E. 14; *Smith v. Sloss Marblehead Lime Co.*, 57 Ohio St. 518, 49 N. E. 695; *Potomac Bottling Works v. Barber & Co.*, 103 Md. 509, 63 Atl. 1068; *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125; *HEWSON-HERZOG SUPPLY CO. v. MINNESOTA BRICK CO.*, 55 Minn. 530, 57 N. W. 129, *Cooley, Cas. Damages*, 1. In case of a total failure to deliver, the buyer may recover the amount with which he could have purchased machines of equal value. If those delivered were defective, the measure of his damages is the cost of supplying the deficiency. *Marsh v. McPherson*, 105 U. S. 709, 26 L. Ed. 1139. See, also, *Stillwell & B. Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035. When the market value is unnat-

If he has prepaid the price, he may still sue for nondelivery, and is entitled to recover the market price of the goods without deduction.<sup>17</sup> If there is no difference between the contract price and the market price, he is entitled only to nominal damages.<sup>18</sup>

urally inflated by unlawful means, it is not the true test. *Kountz v. Kirkpatrick*, 72 Pa. 376, 13 Am. Rep. 687. Where goods are purchased to be shipped abroad, and the fact is known to the seller, and it is impossible for the buyer to discover the inferiority of the goods till they reach their ultimate destination, the measure of damages is the difference between the market price of the goods contracted for at the date of arrival and the price afterwards realized on a sale of the goods, with costs and expenses of sales. *Camden Consolidated Oil Co. v. Schlens*, 59 Md. 31, 43 Am. Rep. 537. Where a job lot of chattels is sold, and the vendor has title only to part, the measure of damages is the difference between the value of the entire lot sold and the value of the lot without those as to which the title failed. *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783. In an action for breach of contract to deliver goods sold, defendant can show the actual cost to the plaintiff of the goods which plaintiff bought from other parties to fill his orders for the goods purchased. *Theiss v. Weiss*, 166 Pa. 9, 31 Atl. 63, 45 Am. St. Rep. 638. See, also, *Josling v. Irvine*, 6 Hurl. & N. 512, where goods were sold by sample and the price was enhanced by improvement in quality. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

"*Startup v. Cortazzi*, 2 Crompt., M. & R. 165; *Winside State Bank v. Lound*, 52 Neb. 469, 72 N. W. 486; *Smethurst v. Woolston*, 5 Watts & S. (Pa.) 106; *Humphreysville Copper Co. v. Vermont Copper Min. Co.*, 33 Vt. 92. Some courts allow the buyer to recover the highest market price between the breach and the action. *Clark v. Pinney*, 7 Cow. (N. Y.) 681; *Gilman v. Andrews*, 66 Iowa, 116, 23 N. W. 291; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614; *Benj. Sales* (Bennett's 6th Am. Ed.) 901, note. See "*Sales*," *Dec. Dig. (Key No.)* §§ 404, 418; *Cent. Dig.* §§ 1146, 1174-1201.

"*Valpy v. Oakeley*, 16 Q. B. 941; *Moses v. Rasin* (C. C.) 14 Fed. 772; *Fessler v. Love*, 48 Pa. 407; *Merriman v. McComick Harvesting Mach. Co.*, 96 Wis. 600, 71 N. W. 1050; *Wire v. Foster*, 62 Iowa, 114, 17 N. W. 174. Nominal damages only will be awarded for failure to deliver certain paid-up stock, which has not been issued, and which has no market or actual value, though it would have cost its par value to procure it, since the measure of damages is not the cost of procuring it, but the loss sustained by failure to receive it. *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

Even if the seller repudiates the contract before the date of delivery, so that the buyer may sue at once, the damages are to be assessed as of the agreed date of delivery, unless it appears that the buyer could have supplied himself in the market on such terms as to mitigate his loss.<sup>19</sup> But, if the time of delivery is extended at the seller's request, damages will be assessed according to the market price at the date to which delivery is postponed.<sup>20</sup>

*Damages Where There is No Market Price*

To the rule of market price there are some exceptions, depending on particular circumstances. The goods may have no market price at the place of delivery for lack of a market, in which case the market value may be determined by ascertaining the market price in the nearest available market, and adding the expense of fetching the goods to the place of delivery;<sup>21</sup> or, if there is no available market, the market value may be determined by ascertaining the cost of manufacturing the goods, if that is the natural and reasonable way to procure

<sup>19</sup> *Roper v. Johnson*, L. R. 8 C. P. 167; *Austrian & Co. v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N. W. 1124; and see, *Frolick v. Independent Glass Co.*, 144 Mich. 278, 107 N. W. 889. Duty of vendee to supply himself elsewhere. *Miller v. Trustees*, 7 Greenl. (Me.) 51, 20 Am. Dec. 341. Cf. *Brown v. Muller*, L. R. 7 Exch. 319. Several deliveries. *Merrimack Mfg. Co. v. Quintard*, 107 Mass. 127; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *McHose v. Fulmer*, 73 Pa. 365. See "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>20</sup> *Ogle v. Earl Vane*, L. R. 3 Q. B. 272; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. Ed. 334; *Hill v. Smith*, 34 Vt. 535; *McDermid v. Redpath*, 39 Mich. 372; *Brown v. Sharkey*, 93 Iowa, 157, 61 N. W. 364. See "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>21</sup> *Grand Tower Min. Mfg. & Transp. Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71; *National Coal Tar Co. v. Malden & Melrose Gas Light Co.*, 189 Mass. 234, 76 N. E. 625; *MARSHALL v. CLARK*, 78 Conn. 9, 60 Atl. 741, 112 Am. St. Rep. 84, *Cooley, Cas. Damages*, 213; *Furlong v. Polleys*, 30 Me. 491, 50 Am. Dec. 635; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34. See, also, ante, p. 272. See "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

them;<sup>22</sup> or, if the exact description of goods cannot be obtained, the damages may be fixed by the price of the best substitute obtainable, if it is reasonable for the buyer to take that course.<sup>23</sup> If no substitute is obtainable, the buyer may be entitled to special damages.<sup>24</sup>

### *Special Damages*

As in other classes of contracts, the damages may be special as well as general. The measure of general damages is the loss directly and naturally resulting from the breach of the contract, under ordinary circumstances. The rule as to market price flows naturally from this general principle. The measure of special damages is the loss directly and naturally resulting from the breach of contract under the special circumstances of the case as contemplated by the parties.<sup>25</sup> Each

<sup>22</sup> *Paine v. Sherwood*, 21 Minn. 225, *E. W. Bliss Co. v. Buffalo Tin Can Co.*, 131 Fed. 51, 65 C. C. A. 289. Where there is no market price, but the goods have been resold, the price paid plus the profits on the resale may be recovered. *Trigg v. Clay*, 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>23</sup> *Hinde v. Liddell*, L. R. 10 Q. B. 265. The buyer must always make reasonable exertions to mitigate his damages. *Kelley, Maus & Co. v. La Crosse Carriage Co.*, 120 Wis. 84, 97 N. W. 678, 102 Am. St. Rep. 971. The measure of damages for breach of contract to furnish certain kinds of coal for a particular purpose is, in case the buyer is forced to purchase a more expensive grade, the difference in price, when the cheaper grade would have answered exactly the same purpose. *Consolidated Coal Co. of St. Louis v. Block & Hartman Smelting Co.*, 53 Ill. App. 565. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>24</sup> *Parsons v. Sutton*, 66 N. Y. 92; *Richardson v. Chynoweth*, 26 Wis. 656. Some courts, however, permit the buyer to recover his actual loss by way of general damages, on the ground that, where an article of similar quality cannot be procured, this is a contingency which must be considered to have been within the contemplation of the parties, who are presumed to know whether the article is of limited production or not. *McHose v. Fulmer*, 73 Pa. 365; *Culin v. Woodbury Glass Works*, 108 Pa. 220; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52. See, also, *Carroll Porter Boiler & Tank Co. v. Columbus Mach. Co.*, 5 C. C. A. 190, 55 Fed. 451. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>25</sup> *HADLEY v. BAXENDALE*, 9 Exch. 341, *Cooley, Cas. Dam-*

case involving special damages must be determined by its own merits. Special damages are not recoverable, unless alleged with sufficient particularity to enable the defendant to meet the demand.<sup>26</sup>

### *Communication of Special Circumstances*

The seller cannot be charged with special damages, unless he had knowledge of the special circumstances from which the special loss would be likely to result;<sup>27</sup> and while, if he had such knowledge, he will generally be charged,<sup>28</sup> it is important to bear in mind that mere communication of the special circumstances is not enough unless it be given under such circumstances as reasonably to imply that it formed the basis of the agreement—that is, unless the circumstances are such that it must be supposed that a reasonable man would have

ages, 39; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718. See, also, *Cassidy v. Le Fevre*, 45 N. Y. 562. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>26</sup> *Smith v. Thomas*, 2 Bing. N. C. 372; *Parsons v. Sutton*, 66 N. Y. 92; *Furlong v. Polleys*, 30 Me. 491, 50 Am. Dec. 635. See ante, p. 332. See "*Damages*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* § 413.

<sup>27</sup> *Cory v. Thames Iron Works & Ship Bldg. Co.*, L. R. 3 Q. B. 181, 37 Law J. Q. B. 68; *British Columbia & V. I. Spar, Lumber & Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499, 37 Law J. C. P. 235; *Bartlett v. Blanchard*, 13 Gray (Mass.) 429; *Fessler v. Love*, 48 Pa. 407; *Billmeyer v. Wagner*, 91 Pa. 92; *Paine v. Sherwood*, 19 Minn. 315 (Gil. 270); *Mihills Mfg. Co. v. Day*, 50 Iowa, 250; *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 165, 53 Atl. 1110; *Peace River Phosphate Co. v. Graffin* (C. C.) 58 Fed. 550; *Masterton v. Mayor, etc., of City of Brooklyn*, 7 Hill (N. Y.) 61. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>28</sup> *Smeed v. Foord*, 1 El. & El. 602, 28 Law J. Q. B. 178 (loss of crop from delay in furnishing threshing machine). A seller who contracts to supply a butcher with ice, knowing it is required to preserve meat, is liable if the meat spoils in consequence of his failure to supply, and the buyer is unable to supply himself elsewhere. *HAMMER v. SCHOENFELDER*, 47 Wis. 455, 2 N. W. 1139, *Cooley, Cas. Damages*, 47. The full amount of damage to lettuce growing in a greenhouse, and frozen by reason of failure to supply water for steam heating, is the measure of damages for such failure. *Watson v. Inhabitants of Needham*, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

had them in contemplation as a probable result of the breach of the contract.<sup>29</sup>

A seller is usually bound for such damages as result to the buyer from being deprived of the ordinary use of a chattel, but not for such damages as result to him from being deprived of its use for a special or extraordinary purpose, which was not communicated.<sup>30</sup> So the buyer is not usually entitled to damages arising from loss of profits on a subsale, or from penalties or expenses incurred by him from inability to execute such subsale;<sup>31</sup> but he may recover such damages if the subsale and the other special circumstances necessary to advise him of the probable consequences of a breach were communicated to the seller.<sup>32</sup>

<sup>29</sup> *British Columbia & V. I. Spar, Lumber & Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499; *Horne v. Midland Ry. Co.*, L. R. 7 C. P. 583, 591, L. R. 8 C. P. 131; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Globe Ref. Co. v. Cotton Oil Co.*, 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171; *MARSHALL v. CLARK*, 78 Conn. 9, 60 Atl. 741, 112 Am. St. Rep. 84, Cooley, Cas. Damages, 213. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>30</sup> *Cory v. Thames Iron Works & Ship Bldg. Co.*, L. R. 3 Q. B. 181, 37 Law J. Q. B. 68. On a contract to deliver furniture for an hotel, set up in the rooms and ready for use on a certain date, damages for delay in performance is measured by the rental value of the rooms, when furnished, during the delay. *Berkey & Gay Furniture Co. v. Hascall*, 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>31</sup> *Williams v. Reynolds*, 6 Best & S. 495, 34 Law J. Q. B. 221; *Devlin v. Mayor, etc., of City of New York*, 63 N. Y. 8; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 627, 12 N. W. 49. See, also, *Fox v. Harding*, 7 Cush. 516; *Borries v. Hutchinson*, 18 C. B. (N. S.) 445; *Huggins v. Southeastern Lime & Cement Co.*, 121 Ga. 311, 48 S. E. 933. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>32</sup> *Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Materiel v. Armstrong*, L. R. 9 Q. B. 473; *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670; *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85; *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Lilly v. Lilly, Bogardus & Co.*, 39 Wash. 337, 81 Pac. 852; *Pacific Sheet Metal Works v. Californian Canneries Co.*, 164 Fed. 980, 91 C. C. A. 108; *Guetzkow Bros. Co. v. Andrews*, 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am.

**SAME—DAMAGES AS FOR CONVERSION**

- 104. Where under a contract of sale the property in the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action for conversion of the goods against the seller and recover their value.**

When the property has passed, if the seller refuses to deliver, the buyer has the same right of action for nondelivery as if the property had not passed; but he has, in addition to his right of action on the contract, the rights of an owner. He has not only the property in the goods, but the right of possession, defeasible in the case of his failure to pay for the goods. If he is not in default, therefore, he may, on the refusal of the seller to deliver, maintain an action for conversion.<sup>33</sup> As a rule, the measure of the buyer's damages in

St. Rep. 909. The damage naturally resulting from the breach of an ordinary contract of sale, and therefore presumably contemplated, is the difference between the contract price and the market price, if the goods have a market price; otherwise it is the difference between the contract price and the actual value. *Rhodes v. Baird*, 16 Ohio St. 573. But where the purchase is made with a view to a known resale already contracted, the damages for a breach are the difference between the two contract prices. *Booth v. Spuyten Duyvil Rolling-Mill Co.*, 60 N. Y. 487; *Carpenter v. First Nat. Bank*, 119 Ill. 354, 10 N. E. 18. Where there is notice of special use or need for goods. See *Fletcher v. Tayleur*, 17 C. B. 21; *Schulze v. Great Eastern R. Co.*, 19 Q. B. Div. 30; *Fox v. Railroad Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702; *Smeed v. Foord*, 1 El. & El. 602; *Simpson v. Railroad Co.*, 1 Q. B. Div. 274; *Richardson v. Chynoweth*, 26 Wis. 656; *Hamilton v. Western N. C. R. Co.*, 96 N. C. 398, 3 S. E. 164; *Deming v. Grand Trunk R. Co.*, 48 N. H. 455, 2 Am. Rep. 267; *Gee v. Railroad Co.*, 6 Hurl. & N. 211; *Jones v. National Printing Co.*, 13 Daly (N. Y.) 92; *Vickery v. McCormick*, 117 Ind. 594, 20 N. E. 495. See "Sales," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>33</sup> *Tiffany, Sales* (2d Ed.) 364. See "Sales," *Dec. Dig. (Key No.)* §§ 404, 405; *Cent. Dig.* §§ 1146-1155.

such an action, either against the seller<sup>34</sup> or a third person, who has dealt with the goods under such circumstances as to amount to a conversion,<sup>35</sup> is the value of the goods at the time of the conversion. But he cannot recover greater damages against the seller by suing in tort than by suing on the contract; and, if he has not paid for the goods, the measure of his damages will be the difference between the contract price and the market value.<sup>36</sup>

### **SAME—DAMAGES FOR BREACH OF WARRANTY**

105. The measure of damages for breach of warranty of fitness, quality, or condition is the estimated loss, directly resulting from the breach of warranty. Such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty.

That the buyer may bring an action for damages in case the goods are inferior in quality to that warranted, follows from the general rule that an action for damages lies in every case of a breach of contract.<sup>37</sup>

<sup>34</sup> *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Philbrook v. Eaton*, 134 Mass. 398. As to the measure of damages when property is of fluctuating value, see ante, p. 284. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>35</sup> *Chinery v. Viall*, 5 Hurl. & N. 288, 29 Law J. Exch. 180; *France v. Gaudet*, L. R. 6 Q. B. 199; *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>36</sup> *Chinery v. Viall*, 5 Hurl. & N. 288, 29 Law J. Exch. 180. See "*Sales*," *Dec. Dig. (Key No.)* § 418; *Cent. Dig.* §§ 1174-1201.

<sup>37</sup> *Tiffany*, *Sales* (2d Ed.) 370; *Poulton v. Lattimore*, 9 Barn. & C. 259; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Scott v. Raymond*, 31 Minn. 437, 18 N. W. 274; *Cox v. Long*, 69 N. C. 7; *Polhemus v. Heiman*, 45 Cal. 573. See "*Sales*," *Dec. Dig. (Key No.)* §§ 425, 427; *Cent. Dig.* §§ 1207-1213.



*Diminution of Damages—Recoupment*

Instead of bringing an action for damages, the buyer may wait till he is sued for the price, and then set up the breach of warranty in diminution pro tanto of the damages.<sup>38</sup> And at common law this was his only way of availing himself of a breach of warranty as a defense. The rule was stated by Parke, B., in the leading case of *Mondel v. Steel*,<sup>39</sup> as follows: "Formerly it was the practice when an action was brought for an agreed price of a specific chattel sold with a warranty, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty; in which action as well the difference between the price contracted for and the real value of the articles as any consequential damage might have been recovered. \* \* \*

The performance of the warranty not being a condition precedent to the payment of the price, the defendant who received the chattel warranted has thereby the property vested in him indefeasibly, and is incapable of returning it back. He has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. \* \* \*

But, after the case of *Basten v. Butter*,<sup>40</sup> a different practice began to prevail, and, being attended with much practical convenience, has since been generally followed; and the defendant is now permitted to show that the chattels, by reason of the noncompliance with the warranty, were diminished in value. \* \* \*

The rule is that it is competent

<sup>38</sup> *Street v. Blay*, 2 Barn. & Adol. 456; *Parson v. Sexton*, 4 C. B. 899; *Poulton v. Lattimore*, 9 Barn. & C. 259; *Withers v. Green*, 9 How. 213, 13 L. Ed. 109; *Lyon v. Bertram*, 20 How. 149, 154, 15 L. Ed. 847; *Bradley v. Rea*, 14 Allen (Mass.) 20; *Dailey v. Green*, 15 Pa. 118, 126; *Dayton v. Hooglund*, 39 Ohio St. 671; *Doane v. Dunham*, 65 Ill. 512; *Id.*, 79 Ill. 131; *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *Morehouse v. Comstock*, 42 Wis. 626; *Polhemus v. Heiman*, 45 Cal. 573; *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755; *Central Trust Co. v. Arctic Ice Mach. Mfg. Co.*, 77 Md. 202, 26 Atl. 493; *Avery v. Burrall*, 118 Mich. 672, 77 N. W. 272; *Pavey Mfg. Co. v. Tobin*, 106 Wis. 286, 82 N. W. 154. See "Sales," *Dec. Dig. (Key No.)* § 428; *Cent. Dig.* §§ 1214-1223.

<sup>39</sup> 8 Mees. & W. 858.

<sup>40</sup> 7 East, 479.

for the defendant, not to set off by a procedure in the nature of a cross action the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in an other action to that extent, but no more."

This case also determined that the buyer must bring a cross action if he desired to claim consequential or special damages; but, under the changed procedure now generally prevailing, the buyer may recover such damages by way of counterclaim.<sup>41</sup> And to-day in most states such damages may be set up by way of defense or counterclaim in an action on a note given for the price.<sup>42</sup>

#### *Measure of Damages*

Prima facie the measure of damages, in case of a breach of warranty, is the difference between the value of the goods as they in fact were and the value of the goods as it would have been if they had been as warranted.<sup>43</sup> This is because,

\* See *Zabriskie v. Central Vt. R. Co.*, 131 N. Y. 72, 29 N. E. 1006; *Kester v. Miller*, 119 N. C. 475, 26 S. E. 115. See "*Sales*," *Dec. Dig. (Key No.)* § 428; *Cent. Dig.* §§ 1214-1223.

\* *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109; *Ruff v. Jarrett*, 94 Ill. 475; *Wentworth v. Dows*, 117 Mass. 14, per Colt, J.; *Wright v. Davenport*, 44 Tex. 164; *Schurmeier v. English*, 46 Minn. 306, 48 N. W. 1112. See "*Sales*," *Dec. Dig. (Key No.)* § 428; *Cent. Dig.* §§ 1214-1223.

\* *PARK v. RICHARDSON & BOYNTON CO.*, 91 Wis. 189, 64 N. W. 859; *Cooley, Cas. Damages*, 215; *Jones v. Just*, L. R. 3 Q. B. 197; *Dingle v. Hare*, 7 C. B. (N. S.) 145, 29 Law J. C. P. 144; *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Case v. Stevens*, 137 Mass. 551; *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310; *Rutan v. Ludlam*, 29 N. J. Law, 398; *Freyman v. Knecht*, 78 Pa. 141; *Porter v. Pool*, 62 Ga. 238; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Ferguson v. Hosier*, 58 Ind. 438; *Case Threshing Mach. Co. v. Haven*, 65 Iowa, 359, 21 N. W. 677; *Aultman & Taylor Co. v. Hetherington*, 42 Wis. 622; *Frohreich v. Gammon*, 28

in ordinary cases, the difference is the loss which results directly from the breach of warranty. But the buyer may recover whatever other losses directly result from the breach.<sup>44</sup> Thus where the seller warranted seed as of a particular description, and delivered inferior seed, he was held liable for the loss of crop which thereby resulted to the buyer;<sup>45</sup> and, where the buyer resold, the seller was held liable for the loss of crop which resulted to the subpurchaser, and for which the buyer, having resold with a warranty, was liable to the subpurchaser.<sup>46</sup>

Minn. 476, 11 N. W. 88; *Merrick v. Wiltse*, 37 Minn. 41, 33 N. W. 3; *Wheeler & W. Mfg. Co. v. Thompson*, 33 Kan. 491, 6 Pac. 902; *Loder v. Kekule*, 3 C. B. (N. S.) 128; *Cary v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; *Miamisburg Twine & Cordage Co. v. Wohlhuter*, 71 Minn. 484, 74 N. W. 175. See "*Sales*," *Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1301.

"Measure of damages for breach of warranty is the difference between the actual value of the defective articles and their value had they been in accordance with the warranties, to which may be added compensation for the trouble and expense incurred, and any other special damages. *J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. 1013. See, also, *Suttle v. Hutchinson* (Tex. Civ. App.) 31 S. W. 211; *Glidden v. Pooler*, 50 Ill. App. 36. See "*Sales*," *Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1301.

"*Wolcott v. Mount*, 38 N. J. Law, 496, 20 Am. Rep. 425; affirming 36 N. J. Law, 262, 13 Am. Rep. 438; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Id.*, 78 N. Y. 393, 34 Am. Rep. 544. See, also, *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136. Contra, *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508. Where a druggist sold Paris green to a planter for the known purpose of killing cotton worms, but the article was not Paris green, and failed to kill the worms on being applied to the buyer's crop, the measure of damages for the breach of the contract, if it resulted in the loss of the crop, was the value of the crop as it stood, with the cost of the article, the expense of applying it, and interest. *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689; *Id.*, 61 Tex. 345, 48 Am. Rep. 280. See, also, *Shaw v. Smith*, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681. See "*Sales*," *Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1301.

"*Randall v. Raper*, El., Bl. & El. 84, 27 Law J. Q. B. 266; *Reese v. Miles*, 99 Tenn. 398, 41 S. W. 1065. See "*Sales*," *Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1301.

The rules in respect to special damages which have already been stated are applicable.<sup>47</sup> The question is what a reasonable man, with the knowledge of the parties, would have contemplated as the probable result of a breach of the warranty had he applied his mind to it. "When one sells and warrants a thing for a particular use, upon reasonable ground for believing that, if put to such use, a certain loss to the buyer will be the probable result if the warranty is untrue, \* \* \* the seller is, under the warranty, chargeable with the loss, as one which may reasonably be supposed to have been in the contemplation of the parties when making the contract."<sup>48</sup>

<sup>47</sup> *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310; *Parks v. Morris Axe & Tool Co.*, 54 N. Y. 586; *Thorne v. McVeagh*, 75 Ill. 81; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4 (seller not liable for valuables stolen from safe warranted burglar proof); *McCormick v. Vanatta*, 43 Iowa, 389; *Aultman v. Stout*, 15 Neb. 586, 19 N. W. 464; *English v. Spokane Commission Co.*, 6 C. C. A. 416, 57 Fed. 451. Buyer reselling with warranty may recover costs of defense against subpurchaser, where seller declines to defend. *Lewis v. Peake*, 7 Taunt. 153; *Hammond v. Bussey*, 20 Q. B. Div. 79. Where the seller sold a refrigerator to a poultry dealer with knowledge that he intended to use it to preserve chickens for the May market, and warranted that it would keep them in perfect condition, which it failed to do, and many chickens were lost, the buyer was entitled to recover, in addition to the difference between the value of the refrigerator as constructed and as warranted, the market value of the chickens lost, less expenses of sale. *Beeman v. Banta*, 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779. Where a manufacturer of ice cream bought coloring matter, which the seller, knowing its purpose, represented to be pure and harmless, but which in fact was poisonous, and the buyer's customers who ate ice cream containing the matter were made sick, and the buyer destroyed the ice cream, held, that the buyer could recover the value of the goods so destroyed, and the damage caused by the resulting loss of customers. *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385. The buyer, suing for breach of warranty of a tackle block, cannot recover a sum paid by him without suit, and without communication with the defendant, to a servant for personal injuries caused by the breaking of the block, unless the servant might have recovered from the plaintiff. *Roughan v. Boston & L. Block Co.*, 161 Mass. 24, 36 N. E. 461. See "*Sales*," *Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1301.

<sup>48</sup> *Frohreich v. Gammon*, 28 Minn. 476, 11 N. W. 88, per Berry,

*Name—Breach of Warranty of Title*

There is an implied warranty that the seller has or will have title to, or a right to sell, the goods, and that they are free from incumbrances. If, after a delivery of the goods, it turns out that this warranty is broken, the buyer may recover the price, if paid.<sup>49</sup> In some jurisdictions, he may elect to recover damages, in which case the measure of damages is the actual loss; that is, the difference between the value of the goods and their value had the title been as warranted.<sup>50</sup> In other jurisdictions, following the rule of damages for breach of covenant of title to real property, the measure of damages is held to be the consideration paid, with interest.<sup>51</sup>

See, also, *Wilson v. Reedy*, 32 Minn. 256, 20 N. W. 153; *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310. Where the vendee uses the article, and thereby suffers loss, the measure of damages recoverable for breach of warranty of quality is not the cost of changing it and making it conform to the warranty, but the losses sustained by him, including profits he would have made. *Beeman v. Banta*, 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779. See *Sales*, *Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1301.

<sup>49</sup> *Wilkinson v. Ferree*, 24 Pa. 190. See *"Sales," Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1301.

<sup>50</sup> *Grose v. Hennessey*, 13 Allen (Mass.) 389; *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783; *Close v. Crossland*, 47 Minn. 500, 50 N. W. 694; *Hendrickson v. Bock*, 74 Minn. 90, 76 N. W. 1019. See *"Sales," Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1301.

<sup>51</sup> *Crittenden v. Posey*, 38 Tenn. 311; *Noel v. Whestley*, 30 Miss. 81; *Arthur v. Moss*, 1 Or. 193. See *"Sales," Dec. Dig. (Key No.)* § 442; *Cent. Dig.* §§ 1284-1301.

## CHAPTER X

### DAMAGES IN ACTIONS AGAINST CARRIERS

- 106-107. Carriers of Goods—Damages for Refusal to Transport.
- 108.       Damages for Loss or Nondelivery.
- 109.       Damages for Injury in Transit.
- 110-111.   Damages for Delay.
- 112.       Consequential Damages.
- 113. Carriers of Passengers—Damages for Injuries to Passenger.
- 114.       Exemplary Damages and Mental Suffering.
- 115.       Personal Injury.
- 116.       Failure to Carry Passenger—Delay.
- 117.       Failure to Carry to Destination—Wrongful Ejection.

### CARRIERS OF GOODS—DAMAGES FOR REFUSAL TO TRANSPORT

- 106. The measure of damages for refusal to receive and transport goods is the difference between the value of the goods at the time and place of refusal and what would have been their value at the time and place where they should have been delivered.
- 107. If other reasonable mode of conveyance can be procured the measure of damages is the increased cost of transportation.

The object of all transportation is to have the use of or an opportunity to sell the goods at the place of destination. The damages for a wrongful refusal to transport goods is, therefore, the value to the shipper of having them at the point of destination. This will ordinarily be the difference between the value of the goods at the time and place of refusal and their value at the place of destination at the time they should

have been delivered there.<sup>1</sup> Thus, where a carrier agreed to transport lumber, railroad ties, etc., from Canada to Boston, and failed to do so, the measure of damages was held to be the difference between the market price in Boston and Canada at the time when the defendant should have performed, less the cost of transportation.<sup>2</sup> But damages cannot be recovered for consequences that might have been avoided by the exercise of reasonable diligence on the part of the plaintiff. Therefore, if other means of transportation may be had, and the circumstances are such that a reasonably prudent man would forward the goods by those means, the measure of damages is the increased expense of transportation by such means;<sup>3</sup> and, if such means is no more expensive, and is equally convenient, only nominal damages can be recovered.<sup>4</sup>

<sup>1</sup> *Pennsylvania R. Co. v. Titusville & P. P. R. Co.*, 71 Pa. 350; *Galena & C. U. R. Co. v. Rac*, 18 Ill. 488, 68 Am. Dec. 574; *Inman v. St. Louis S. W. Ry. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 87; *Harvey v. Railroad Co.*, 124 Mass. 421, 26 Am. Rep. 673; *Bridgman v. The Emily*, 18 Iowa, 509; *Ward's Cent. & P. Lake Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544; *O'Conner v. Forster*, 10 Watts (Pa.) 418; *Bracket v. McNair*, 14 Johns. (N. Y.) 170, 7 Am. Dec. 447. See "*Carriers*," *Dec. Dig. (Key No.)* § 45; *Cent. Dig.* § 239.

<sup>2</sup> *Harvey v. Connecticut & P. R. R. Co.*, 124 Mass. 421, 26 Am. Rep. 673. See "*Carriers*," *Dec. Dig. (Key No.)* § 45; *Cent. Dig.* § 239.

<sup>3</sup> *O'Conner v. Forster*, 10 Watts (Pa.) 418; *Ogden v. Marshall*, 8 N. Y. 340, 59 Am. Dec. 497; *Grund v. Pendergast*, 58 Barb. (N. Y.) 216; *Higginson v. Weld*, 14 Gray (Mass.) 165; *Crouch v. Railway Co.*, 11 Exch. 742. When a refusal to perform is shown on the part of the carrier, and it is proven that the price of transportation had risen before the time the ship sailed, the plaintiff is entitled to his damages, measured by the rise in the price, without proving that he had the freight ready to ship. *Ogden v. Marshall*, 8 N. Y. 340, 59 Am. Dec. 497. See, also, *Nelson v. Plimpton Fireproof Elevating Co.*, 55 N. Y. 480. Cf. *Bohn v. Cleaver*, 25 La. Ann. 419. Plaintiff cannot recover for damages caused by his failure to properly care for the goods while they were in store awaiting transportation, and before they had been accepted by the carrier. *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330. See "*Carriers*," *Dec. Dig. (Key No.)* § 45; *Cent. Dig.* § 239.

<sup>4</sup> 3 *Suth. Dam.* § 899.

**SAME—DAMAGES FOR LOSS OR NONDELIVERY**

- 108. The measure of damages for total loss or non-delivery is the value of the goods at the time and place they should have been delivered.**

Obviously, the natural and probable consequences of a failure to deliver the goods at their destination is a loss to the owner, amounting to the value of the goods at that point, and such value is therefore the measure of damages.<sup>5</sup> Ordinarily, value means market value, but where goods have no market value their value to the owner may be recovered.<sup>6</sup>

<sup>5</sup>*Rodocanachi v. Milburn*, 18 Q. B. Div. 67; *Atlantic & B. Ry. Co. v. Howard Supply Co.*, 125 Ga. 478, 54 S. E. 530; *BLACKMER v. CLEVELAND C. C. & ST. L. RY. CO.*, 101 Mo. App. 557, 73 S. W. 913, *Cooley, Cas. Damages*, 216. Cf. *Magnin v. Dinsmore*, 56 N. Y. 168; *Id.*, 62 N. Y. 35, 20 Am. Rep. 442; and *Id.*, 70 N. Y. 410, 26 Am. Rep. 608. See, also, *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *Spring v. Haskell*, 4 Allen (Mass.) 112; *Sangamon & M. R. Co. v. Henry*, 14 Ill. 156; *Chicago & N. W. Ry. Co. v. Dickinson*, 74 Ill. 249; *Arthur v. The Cassius*, 2 Story, 81, Fed. Cas. No. 564; *The Nith (D. C.)* 36 Fed. 86; *South & North Alabama R. Co. v. Wood*, 72 Ala. 451; *Marquette, H. & O. R. Co. v. Langton*, 32 Mich. 251; *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268; *Gray v. Missouri River Packet Co.*, 64 Mo. 47; *Atkisson v. The Castle Garden*, 28 Mo. 124; *Sturgess v. Bis-sell*, 46 N. Y. 462; *Shaw v. Railroad Co.*, 5 Rich. (S. C.) 462, 57 Am. Dec. 768; *Chapman v. Railroad Co.*, 26 Wis. 295, 7 Am. Rep. 81; *Whitney v. Chicago & N. W. Ry. Co.*, 27 Wis. 327; *The Joshua Barker*, 1 Abb. Adm. 215, Fed. Cas. No. 7,547. But see *The Telegraph*, 14 Wall. 258, 20 L. Ed. 807; *Wheelwright v. Beers*, 2 Hall (N. Y.) 413; *Jackson v. The Julia Smith, Newb.* 61, Fed. Cas. No. 7,136 (where the invoice price with interest was held to be the measure of damages). For failure to deliver machinery shipped from England to Vancouver's Island, the damages were held to be the cost of replacing the lost machinery in Vancouver's Island, with interest upon the amount until judgment by way of compensation for delay. *British Columbia & V. I. Spar, Lum-ber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 94, 135; *Cent. Dig.* §§ 389-392, 599-604½.

<sup>6</sup>See ante, p. 277. And see *Rodocanachi v. Milburn*, 18 Q. B. Div. 67. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 94, 135; *Cent. Dig.* §§ 389-392, 599-604½.



Though the general rule undoubtedly is that the value at the point of destination furnishes the measure of damages, a distinction is made in some jurisdictions in the case of sea voyages. Thus it has been held, in New York, that when a loss to cargo, from leakage or otherwise, occurs in the port where it is laden, and before the voyage begins, the carrier is liable for its value at such port. But when the loss happens after the vessel has left the port of shipment, then the value of the goods at the place of destination, deducting the charges, furnishes the true rule of damages.<sup>7</sup>

In the case of connecting carriers, each carrier is liable only for the value at the terminus of its own route,<sup>8</sup> unless it has expressly or impliedly contracted to carry the goods to their ultimate destination, in which case the value at the latter point furnishes the measure of damages.<sup>9</sup>

The value should be estimated as of the time when the goods should have been delivered.<sup>10</sup>

A misdelivery is equivalent to a nondelivery, and the measure of damages is the same.<sup>11</sup> If the goods are ultimately received by the owner, the damages will be reduced by the value of the goods received, less the expense of recovering them, or the damages caused by the delay.<sup>12</sup>

<sup>7</sup> *Krohn v. Oechs*, 48 Barb. 127; *Watkinson v. Laughton*, 8 Johns. (N. Y.) 213. See, also, *Lakeman v. Grinnell*, 5 Bosw. 625; *King v. Shepherd*, 3 Story, 349, Fed. Cas. No. 7,804. See "*Carriers*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* §§ 599-604½.

<sup>8</sup> *Louis v. Buckeye*, 1 Handy (Ohio) 150. And see *Marshall v. New York Cent. R. Co.*, 45 Barb. (N. Y.) 502. See "*Carriers*," *Dec. Dig. (Key No.)* § 177; *Cent. Dig.* §§ 775-803.

<sup>9</sup> *Perkins v. Portland S. & P. R. Co.*, 47 Me. 573, 74 Am. Dec. 507; *Erie Ry. Co. v. Lockwood*, 28 Ohio St. 358. And see *Michigan Southern & N. I. R. Co. v. Caster*, 13 Ind. 164. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 177, 186; *Cent. Dig.* §§ 775-803, 790.

<sup>10</sup> *Smith v. Griffith*, 3 Hill (N. Y.) 333, 38 Am. Dec. 639; *Kent v. Railroad Co.*, 22 Barb. (N. Y.) 278. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 177, 186; *Cent. Dig.* §§ 775-803, 790.

<sup>11</sup> *Sedg. Dam.* § 853; *Forbes v. Boston & L. R. Co.*, 133 Mass. 154; *Baltimore & O. R. Co. v. Pumphrey*, 59 Md. 390. See "*Carriers*," *Dec. Dig. (Key No.)* § 94; *Cent. Dig.* §§ 389-392.

<sup>12</sup> *Chicago & N. W. Ry. Co. v. Stanbro*, 87 Ill. 195; *Rosenfield v. Express Co.*, 1 Woods, 131, Fed. Cas. No. 12,060; *Jellett v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 265, 15 N. W. 237. See "*Carriers*," *Dec. Dig. (Key No.)* § 94; *Cent. Dig.* §§ 389-392.

**SAME—DAMAGES FOR INJURY IN TRANSIT**

**109. The measure of damages for injury to goods in transit is the difference between the value of the goods at the time and place of delivery in their damaged condition and what their value would have been had they been delivered in good order.**

Where there is a total failure to deliver the goods, the owner's loss is their real value. It is obvious that if the goods are delivered to the consignee, but in a damaged condition, the actual loss is diminished by an amount equal to the value of the damaged goods received, and the difference between this value and what the value would have been had the goods been delivered uninjured is the measure of damages.<sup>13</sup> Thus, butterine shipped to New Orleans was damaged in transit, through the carrier's negligence. On its arrival its market value in its damaged condition was 7½ cents per pound, at which price it was sold. Had it been in good order, its market value would have been 15 or 16 cents a pound. It was held that plaintiff was entitled to the difference with interest.<sup>14</sup>

<sup>13</sup> *Notara v. Henderson*, L. R. 7 Q. B. 225; *Silverman v. St. Louis, I. M. & S. Ry. Co.*, 51 La. Ann. 1,785, 26 South. 447; *Paterson v. Chicago, M. St. P. Ry. Co.*, 95 Minn. 57, 103 N. W. 621; *King v. Sherwood*, 22 App. Div. 548, 48 N. Y. Supp. 34; *Chicago, B. & Q. R. Co. v. Hale*, 83 Ill. 360, 25 Am. Rep. 403; *Brown v. Aunard S. S. Co.*, 147 Mass. 58, 16 N. E. 717; *Louisville & N. R. Co. v. Mason*, 11 Lea (Tenn.) 116; *Magdeburg General Ins. Co. v. Paulson* (D. C.) 29 Fed. 530; *The Mangalore* (D. C.) 23 Fed. 463. See *McGregor v. Kilgore*, 6 Ohio, 359, 27 Am. Dec. 260; *Morrison v. I. & V. Florio S. S. Co.* (D. C.) 36 Fed. 569, 571; *The Compta*, 5 Sawy. 137, Fed. No. 3,070. *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; *Hackett v. B. C. & M. R. R. Co.*, 35 N. H. 390. Carrier is not entitled to benefit of insurance held by shipper. *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 568, 28 L. Ed. 527; *Merrick v. Brainard*, 38 Barb. (N. Y.) 574. See "*Carriers*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* §§ 599-604½.

<sup>14</sup> *Western Mfg. Co. v. The Guiding Star* (C. C.) 37 Fed. 641. See "*Carriers*," *Dec. Dig. (Key No.)* § 135; *Cent. Dig.* §§ 599-604½.

The rule applies even where there has been both delay and damage to the goods, though during the delay there has been an advance in the market price, by reason of which the goods in their damaged condition are worth as much as if they had arrived sound and on time. In such a case it was held that the owner was entitled to recover the difference between the market price on the day of delayed delivery, and the price for which the damaged goods sold.<sup>16</sup> The carrier cannot escape liability by reason of the advance in price between the dates of required and actual delivery.

### **SAME—DAMAGES FOR DELAY**

110. The measure of damages for delay is the difference between the value of the goods at the time and place fixed for delivery and their value at the time and place of actual delivery.
111. Where the value of the goods is not diminished by the delay, the measure of damages is the value of their use during the period of delay.

The first rule is well illustrated by a leading English case.<sup>16</sup> A cap manufacturer delivered to a carrier cloth bought to make up into caps to be carried to M. Owing to an unreasonable delay in delivery, the cloth was received too late for use that season. The carrier knew nothing with reference to plaintiff's business or intentions. It was held that the measure of damages for the delay was not the profits plaintiff might have made, but the diminution in value of the goods owing to the time for finding customers having passed.<sup>17</sup>

<sup>16</sup> *Morrison v. I. & V. Florio S. S. Co.* (D. C.) 36 Fed. 569. See, also, *The Compta*, 5 Sawy. 137, Fed. Cas. No. 3,070; *Gibbs v. Gildersleeve*, 26 U. C. Q. B. 471. See "*Carriers*," *Dec. Dig.* (Key No.) § 135; *Cent. Dig.* §§ 557-559, 599-604½.

<sup>17</sup> *Wilson v. Railway Co.*, 9 C. B. (N. C.) 632. See "*Carriers*," *Dec. Dig.* (Key No.) § 105; *Cent. Dig.* §§ 451-458.

<sup>18</sup> See, also, *Cutting v. Grand Trunk Ry. Co.*, 13 Allen (Mass.) 381; *Clark v. American Express Co.*, 130 Iowa, 254, 106 N. W. 642;

However, if the value of the goods is not diminished by the delay, the measure of damages is the value of their use during the delay.<sup>18</sup> The second rule is also illustrated by an action for delay in forwarding money. The measure of damages was held to be interest on the money during the period of delay.<sup>19</sup> So in an action for delay in delivering machinery, the measure of damages was said to be the value of the use

*Houseman v. Merchants' Dispatch Transp. Co.*, 104 Mich. 300, 62 N. W. 290; *Chicago, R. I. P. Ry. Co. v. Broe*, 16 Okl. 25, 86 Pac. 441; *Weston v. Grand Trunk Ry. Co.*, 54 Me. 376, 92 Am. Dec. 552; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Ward v. New York Cent. R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405; *Scott v. Boston & N. O. S. S. Co.*, 106 Mass. 468; *Collard v. Railway Co.*, 7 Hurl. & N. 79; *Ayres v. Chicago & N. W. Ry. Co.*, 75 Wis. 215, 43 N. W. 1122; *Ingledew v. Northern R.*, 7 Gray (Mass.) 86. Cf. *The Parana*, 1 Prob. Div. 452. And see same case, reversed, 36 Law T. (N. S.) 388. See, also, *Devereux v. Buckley*, 34 Ohio St. 16, 32 Am. Rep. 342. Money spent looking for goods may be recovered. *Hales v. Railway Co.*, 4 Best & S. 66. Cf. *Woodger v. Railway Co.*, L. R. 2 C. B. 318. Where goods have been resold and the carrier notified of the price, such price is to be taken as their true value, *Deming v. Grand Trunk R. Co.*, 48 N. H. 455, 470, 2 Am. Rep. 267; but where the carrier is not notified of such price, the market price is considered their true value, *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131. Cf. *ILLINOIS CENT. R. CO. v. COBB*, 64 Ill. 128, *Cooley, Cas. Damages*, 65, where shipper was allowed to recover on basis of contract price. Where goods have been sold "to arrive," and the market value at the time when they should have arrived was greater than the contract price, recovery has been allowed on the basis of market value. *Rodocanachi v. Milburn*, L. R. 18 Q. B. Div. 67. Interest should be allowed. *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268; *Houston & T. C. Ry. Co. v. Jackson*, 62 Tex. 209; *Newell v. Smith*, 49 Vt. 255. Damage for shrinkage in weight of live stock may be recovered. *Illinois Cent. R. Co. v. Owens*, 53 Ill. 391; *Sturgeon v. St. Louis K. C. & N. Ry. Co.*, 65 Mo. 569. It has been held that the rule does not apply to delay in transportation by sea. *The Parana*, 1 Prob. Div. 452, 2 Prob. Div. 118. See criticism of this case in *Sedg. Dam.* § 855. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

<sup>18</sup> *DAVIDSON DEVELOPMENT CO. v. SOUTHERN RY. CO.*, 147 N. C. 503, 61 S. E. 381, *Cooley, Cas. Damages*, 218. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

<sup>19</sup> *United States Exp. Co. v. Haines*, 67 Ill. 137. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

of the machinery, or the sum for which plaintiff might have hired like machinery.<sup>20</sup>

### **SAME—CONSEQUENTIAL DAMAGES**

**112. Consequential damages arising from a carrier's default may be recovered provided they are natural and probable consequences of the breach of duty.**

In the case of all the rules heretofore stated with reference to the measure of damages, the damages allowed have been for losses directly caused by the carrier's breach of duty. But consequential or indirect damages arising from such breaches of duty may also be recovered, provided they are natural and probable consequences. The following rules may be stated: Damages beyond the difference in market values will not be allowed unless the consequences of a default are communicated to or known by the company at the time and place of delivery to them. Only such losses can be recovered as were reasonably contemplated by both parties at the time the contract for carriage was made as likely to arise from a breach, and not losses arising out of circumstances then wholly unknown to the carrier. Damages will be given only for the reasonable and proximate, and not for the remote, consequences of the breach of duty.<sup>21</sup>

<sup>20</sup> *Priestly v. Railroad Co.*, 26 Ill. 206, 79 Am. Dec. 369. To the same effect, see *Missouri K. & T. Ry. Co. v. Clifton* (Tex. Civ. App.) 80 S. W. 386. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

<sup>21</sup> *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Crutcher v. Choctaw, O. & G. R. Co.*, 74 Ark. 358, 85 S. W. 770; *Traywick v. Southern Ry. Co.*, 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563; *HADLEY v. BAXENDALE*, 9 Exch. 341, *Cooley, Cas. Damages*, 39; *Gee v. Railway Co.*, 6 Hurl. & N. 211. As to sufficiency of notice of special circumstances, see *Horne v. Railway Co.*, L. R. 8 C. P. 131, affirming L. R. 7 C. P. 583. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

*Illustrations*

In actions for failure or refusal to transport, losses on subcontracts may be recovered, provided the carrier had notice of such contracts;<sup>22</sup> otherwise not.<sup>23</sup> Where the carrier knows that the material is needed in carrying on work by the plaintiff, "the natural consequences of delay and stoppage of work, and payment of wages and expenses arising therefrom, and the loss from not having the work finished at the time it otherwise would have been," may be recovered; but the increased expense of labor in doing the work is too remote.<sup>24</sup> And where the shipper, by reason of the delay in delivery, was obliged to pay a penalty to the vendee of the goods, the amount of the penalty was the measure of damages.<sup>25</sup>

In actions for loss or nondelivery of goods, the reasonable expense of searching for them may be recovered;<sup>26</sup> but damages for delay in completing a house, caused by the loss of a set of plans of which the defendant had no notice, is too remote.<sup>27</sup>

<sup>22</sup> *Cobb v. Illinois Cent. R. Co.*, 38 Iowa, 601, 630. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 45, 69; *Cent. Dig.* § 239.

<sup>23</sup> *Harvey v. Connecticut & P. R. R. Co.*, 124 Mass. 421, 26 Am. Rep. 673. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

<sup>24</sup> *Pennsylvania R. Co. v. Titusville & P. Plank Road Co.*, 71 Pa. 350. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

<sup>25</sup> *Illinois Cent. R. Co. v. Southern Seating & Cabinet Co.*, 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. Rep. 933. See "*Carriers*," *Dec. Dig. (Key No.)* § 105; *Cent. Dig.* §§ 451-458.

<sup>26</sup> *Hales v. Railway Co.*, 4 Best & S. 66; *Farwell v. Davis*, 66 Barb. (N. Y.) 73; *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183; *Davis v. Railroad Co.*, 1 Disn. (Ohio) 23. Contra, *Mississippi Cent. R. Co. v. Kennedy*, 41 Miss. 671. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 94, 135; *Cent. Dig.* §§ 389-392, 599-604½.

<sup>27</sup> *Mather v. American Exp. Co.*, 138 Mass. 55, 52 Am. Rep. 359. Consequential damages for delay, see *Black v. Baxendale*, 1 Exch. 410; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Favor v. Philbrick*, 5 N. H. 358; *Horne v. Railway Co.*, L. R. 7 C. P. 583; *Wilson v. Railway Co.*, 18 Eng. Law & Eq. 557; *Grindle v. Eastern Exp. Co.*, 67 Me. 317, 24 Am. Rep. 31; *Gibbs v. Gildersleeve*, 26 U. C. Q. B. 471. See "*Carriers*," *Dec. Dig. (Key No.)* §§ 94, 135; *Cent. Dig.* §§ 389-392, 599-604½.

### 113. CARRIERS OF PASSENGERS—DAMAGES FOR INJURIES TO PASSENGER

"The obligations or responsibilities of public carriers do not arise altogether or mainly out of contracts; they are principally imposed by law. The refusal to undertake the conveyance of a passenger without excuse, or when actionable, is merely a violation of a carrier's duty. He has refused to contract. So his duty to carry with care, though it may to some extent be regulated and restricted by contract, is imposed by law, and cannot, as is generally held, be contracted away. Hence actions against these carriers are generally in tort for negligence, or for misconduct involving a breach of duty. Contracts, however, are usually made fixing the extent of the route, the mode of conveyance, the kind of accommodations, the time, etc.; and, therefore, actions founded upon such contracts may be maintained. Whether the action be upon the breach of duty or for violation of contract, to the extent that they involve the same acts and omissions, the damages as measured by law are substantially the same."<sup>28</sup> The consequences in this class of cases fall directly upon the person, and in most cases are not distinguishable from those of a tort. In either tort or contract the damages are measured by the probable or natural consequences of the wrong, but the natural and probable consequences of a breach of contract must be determined with regard to all the facts known to the parties at the time the contract was made. Thus in *Hobbs v. Railway Co.*<sup>29</sup> it appeared that plaintiff, with his wife and children, were set down at the wrong station, and, being unable to get a conveyance, they were obliged to walk, the wife catching a severe cold. It was held that there could be no recovery for the expense of the illness, because it was not within the contemplation of the parties, nor a probable consequence of having to walk home. The action was on the contract. The authority of this decision was much shaken by the opinions

<sup>28</sup> 3 Suth. Dam. § 934.

<sup>29</sup> 10 Q. B. 111.

of *Bramwell and Brett, L. J.*, in *McMahon v. Field*,<sup>30</sup> and has been practically neutralized in most states by holding that it does not apply where the action sounds in tort; and cases of this character have been almost always treated as sounding in tort.<sup>31</sup> Thus, in an action for neglect to transport a passenger across the Isthmus of Panama according to contract, the plaintiff was allowed to recover the expense of a subsequent illness caused by being left in that unhealthy country.<sup>32</sup> *Brown v. Chicago M. & St. P. Ry. Co.*<sup>33</sup> was a case very similar to the *Hobbs Case*. In an elaborate opinion the court reached a conclusion directly opposite to that reached in the *Hobbs Case*. Mr. Sedgwick has admirably stated the pith of the whole matter as follows: "Upon the whole, these cases seem to illustrate very strongly a point upon which too much insistence cannot be laid—that the case of *Hadley v. Baxendale* introduced no new rule of damages. For proximate and natural consequences of the defendant's act,

<sup>30</sup> 7 Q. B. Div. 591.

<sup>31</sup> *Alabama G. S. R. Co. v. Heddleston*, 82 Ala. 218, 3 South. 53; *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 74; *Id.*, 61 Md. 619, 48 Am. Rep. 134; *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588; *YORTON v. RAILWAY CO.*, 62 Wis. 367, 21 N. W. 516, and 23 N. W. 401, *Cooley, Cas. Damages*, 231. It has been fully followed in some jurisdictions. *Pullman Palace Car Co. v. Barker*, 4 Colo. 344; *Murdock v. Boston & A. R. Co.*, 133 Mass. 15, 43 Am. Rep. 480. It has been said, where the breach of contract was not also a tort, the rule in *Hobb's Case* will apply. 2 Sedg. Dam. § 868; *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41. No such case has been found. A passenger may declare for a breach of contract, where there is one, but it is at his election to proceed as for a tort where there has been personal injury suffered by the negligence or wrongful act of the carrier, or the agents of the company; and in such action the plaintiff is entitled to recover according to the principles pertaining to that class of actions, as distinguished from actions on contract. *Baltimore City Pass. Ry. Co. v. Kemp*, 61 Md. 619. See "*Damages*," *Dec. Dig. (Key No.)* §§ 16-23; *Cent. Dig.* §§ 35-64.

<sup>32</sup> *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333. See "*Damages*," *Dec. Dig. (Key No.)* §§ 16-23; *Cent. Dig.* §§ 34-64.

<sup>33</sup> 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41. See "*Damages*," *Dec. Dig. (Key No.)* §§ 16-23; *Cent. Dig.* §§ 34-64.



whether it be a breach of contract or of tort, a recovery can always be had. The only meaning of the rule with regard to the contemplation of the parties is that in contract a particular species of proof as to special consequences is often available, which is not so in tort."<sup>34</sup>

#### 114. SAME—EXEMPLARY DAMAGES AND MENTAL SUFFERING

There is another light in which the form of action becomes important. Where the action is upon the contract, exemplary damages cannot be recovered;<sup>35</sup> but where the action is for a tort, founded on a breach of the public duty, exemplary damages may be given in proper cases.<sup>36</sup> So, also, it is usually held that damages for mental suffering cannot be recovered in an action on a contract,<sup>37</sup> though the rule is far from being settled, and is denied by many courts of ability.

#### 115. SAME—PERSONAL INJURY

In actions for personal injury to a passenger the measure of damages is usually the same as in ordinary cases of per-

<sup>34</sup> 2 Sedg. Dam. § 871.

<sup>35</sup> *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Cleveland, C., C. & St. L. Ry. Co. v. Quillen*, 22 Ind. App. 496, 53 N. E. 1024; *Hamlin v. Railway Co.*, 1 Hurl. & N. 408. See, also, ante, p. 318. See "*Carriers*," *Dec. Dig. (Key No.)* § 319; *Cent. Dig.* §§ 1338-1345; "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 104, 105.

<sup>36</sup> *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. Dec. 588; *Birmingham Ry., Light and Power Co. v. Nolan*, 134 Ala. 329, 32 South. 715; *Oliver v. Columbia, N. & L. R. Co.*, 65 S. C. 1, 43 S. E. 307; *Berg v. St. Paul City R. Co.*, 96 Minn. 513, 105 N. W. 191. See "*Carriers*," *Dec. Dig. (Key No.)* § 319; *Cent. Dig.* §§ 1338-1345; "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* §§ 104, 105.

<sup>37</sup> *Walsh v. Chicago M. & St. P. Ry. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Kansas City, Ft. S. & M. R. Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645; *TURNER v. GREAT NORTHERN RY. CO.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883, *Cooley, Cas. Damages*, 105. See, also, ante, p. 160. See "*Carriers*," *Dec. Dig. (Key No.)* § 319; *Cent. Dig.* §§ 1338-1345; "*Damages*," *Dec. Dig. (Key No.)* § 56; *Cent. Dig.* 104, 105.

sonal injury. Compensatory damages for pain, mental and physical, and for loss of time, medical expenses, diminution of earning power, and the like, may always be recovered.<sup>38</sup> Damages cannot be recovered for mere fright, but, when a nervous shock naturally results in physical injury, damages may be recovered therefor.<sup>39</sup>

#### 116. SAME—FAILURE TO CARRY PASSENGER— DELAY

Damages for failure to transport a passenger include compensation for the increase of cost of carriage by another conveyance, the loss of time, and other ordinary expenses of delay.<sup>40</sup> Plaintiff can incur only reasonable expense in avoiding the consequences of the delay.<sup>41</sup> Whether or not plaintiff would have adopted the course he should have adopted if the delay had occurred through his own fault, and he had not the carrier to look to for compensation, has been suggested as a test of reasonableness.<sup>42</sup> Substantially the same principles are applicable in actions for delay.

#### 117. SAME—FAILURE TO CARRY TO DESTINA- TION—WRONGFUL EJECTION

Where a carrier fails to carry a passenger to his destination, and sets him down at some intermediate point, compen-

<sup>38</sup> Sedg. Dam. §§ 481, 860. See, also, ante, p. 128.

<sup>39</sup> *Bell v. Railway Co.*, 26 L. R. Ir. 428; *Victorian Ry. Com'rs v. Coultas*, L. R. 13 App. Cas. 222. See, also, ante, p. 146. See "Damages," *Dec. Dig. (Key No.)* §§ 97-102; *Cent. Dig.* §§ 230-259.

<sup>40</sup> *BALTIMORE & O. R. CO. v. CARR*, 71 Md. 135, 17 Atl. 1052, Cooley, Cas. Damages, 204; *Eddy v. Harris*, 78 Tex. 661, 15 S. W. 107, 22 Am. St. Rep. 88; *Porter v. The New England* No. 2, 17 Mo. 290; *The Zenobia*, Abb. Adm. 80, Fed. Cas. No. 18,209; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333. See "Carriers," *Dec. Dig. (Key No.)* § 277; *Cent. Dig.* §§ 1082-1084.

<sup>41</sup> Sedg. Dam. § 862.

<sup>42</sup> *Le Blanche v. Railway Co.*, 1 C. P. Div. 286. See "Carriers," *Dec. Dig. (Key No.)* § 277; *Cent. Dig.* §§ 1082-1084.

sation may be recovered for all the expenses of delay,<sup>43</sup> including loss of time<sup>44</sup> and cost of a reasonable conveyance to his destination.<sup>45</sup> He may also recover compensation for the indignity of the expulsion from the train, and, if there are aggravating circumstances, he may recover exemplary damages.<sup>46</sup> Where, by the fault of the carrier's agents, and without the passenger's fault, the ticket of the passenger is not such a one as he should have to entitle him to passage, the carrier will be liable in damages for expelling him.<sup>47</sup> It

<sup>43</sup> *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Bullock v. White Star S. S. Co.*, 30 Wash. 448, 70 Pac. 1106; *Pennsylvania R. Co. v. Connell*, 127 Ill. 419, 20 N. E. 89; carrying beyond, *Trigg v. St. Louis K. C. & N. Ry. Co.*, 74 Mo. 147, 41 Am. Rep. 305. See "*Carriers*," *Dec. Dig. (Key No.)* § 382; *Cent. Dig.* §§ 1483-1491.

<sup>44</sup> *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25. See "*Carriers*," *Dec. Dig. (Key No.)* § 382; *Cent. Dig.* §§ 1483-1491.

<sup>45</sup> *Indianapolis, B. & W. Ry. Co. v. Birney*, 71 Ill. 391; *Rose v. King*, 76 App. Div. 308, 78 N. Y. Supp. 419; *Pennsylvania R. Co. v. Connell*, 127 Ill. 419, 20 N. E. 89; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25. See "*Carriers*," *Dec. Dig. (Key No.)* § 382; *Cent. Dig.* §§ 1483-1491.

<sup>46</sup> *Hanson v. European & N. A. Ry. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Yates v. New York Cent. & H. R. R. Co.*, 67 N. Y. 100; *Ellsworth v. Chicago, B. & Q. Ry. Co.*, 95 Iowa, 98, 63 N. W. 584, 29 L. R. A. 173; *Kansas City, Ft. S. & M. R. Co. v. Little*, 66 Kan. 378, 71 Pac. 820, 61 L. R. A. 122, 97 Am. St. Rep. 376; *LITTLE ROCK RY. & ELECTRIC CO. v. DOBBINS*, 78 Ark. 553, 95 S. W. 788, *Cooley, Cas. Damages*, 224; *Seaboard Airline Ry. v. O'Quin*, 124 Ga. 357, 52 S. E. 427, 2 L. R. A. (N. S.) 472; *Atchison, T. & S. F. R. Co. v. Long*, 5 Kan. App. 644, 47 Pac. 993; *Summerfield v. St. Louis Transit Co.*, 108 Nev. App. 718, 84 S. W. 172. See, also, cases cited post, notes 52, 53. See "*Carriers*," *Dec. Dig. (Key No.)* § 382; *Cent. Dig.* §§ 1478, 1489.

<sup>47</sup> *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Kansas City, M. & B. R. Co. v. Riley*, 68 Miss. 765, 9 South. 443, 13 L. R. A. 38, 24 Am. St. Rep. 309; *McKay v. Ohio River Ry. Co.*, 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913; *Murdock v. Boston & A. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307; *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859; *Id.*, 53 Mich. 118, 18 N. W. 580; *YORTON v. MILWAUKEE L. S. & W. RY. CO.*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23; *Id.*, 62 Wis. 367, 21 N. W. 516, 23 N. W.

is an interesting question to determine the true measure of damages in such a case. What are the natural and probable consequences of such a wrong? This must be answered with a view to the nature of the wrong and the time it was committed. It has been contended that the only natural and legitimate result of selling plaintiff a wrong ticket, or depriving him of a proper one, is to compel him to pay his fare a second time; and that he commits a breach of social duty in failing to protect himself thus, at trifling expense, from the consequences of the fault or mistake of the carrier's servant.<sup>48</sup> If he does so, the amount paid, with interest, furnishes the measure of damages. But we apprehend that he is not compelled to do so. He may elect to leave the train, and in that case may recover not only the amount of the additional fare which he is subsequently obliged to pay in order to reach his destination, but all damages sustained by him as a direct and natural consequence of the ejection.<sup>49</sup> The reason for this is that the rule of avoidable consequences does not require one to anticipate a wrong, and to take steps to avoid its consequences, before it is committed. He is entitled to presume that no wrong will be committed. The rule merely

401, *Cooley, Cas. Damages*, 221. But if by mutual mistake, or by fault of the passenger, his ticket is one which does not entitle him to passage, he may properly be ejected, even though he may have a right of action against the carrier for selling him an improper ticket. *YORTON v. MILWAUKEE, L. S. & W. RY. CO.*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23; *Id.*, 62 Wis. 367, 21 N. W. 516, *Cooley, Cas. Damages*, 221; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481; *Frederick v. Marquette, H. & O. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531. See "*Carriers*," *Dec. Dig. (Key No.)* § 356; *Cent. Dig.* §§ 1409-1432.

\* *YORTON v. MILWAUKEE, L. S. & W. RY. CO.*, 62 Wis. 367, 21 N. W. 516, 23 N. W. 401, *Cooley, Cas. Damages*, 221; 2 *Sedg. Dam.* § 865. See, also, *Brown v. Rapid R. Co.*, 130 Mich. 483, 90 N. W. 290. See "*Carriers*," *Dec. Dig. (Key No.)* § 356; *Cent. Dig.* §§ 1409-1432.

\* *YORTON v. MILWAUKEE, L. S. & W. RY. CO.*, 62 Wis. 367, 371, 21 N. W. 516, 23 N. W. 401, *Cooley, Cas. Damages*, 221; *Ammons v. Southern Ry. Co.*, 140 N. C. 196, 52 S. E. 731; *Cleveland City Ry. Co. v. Conner*, 74 Ohio St. 225, 78 N. E. 376; *Houston & T. C. R. Co. v. Crone (Tex. Civ. App.)* 37 S. W. 1074. See "*Carriers*," *Dec. Dig. (Key No.)* § 382; *Cent. Dig.* §§ 1483-1491.

requires one who has been already injured to use all reasonable means to make the loss as light as possible. Whether it is a passenger's duty, therefore, to pay his fare a second time, and thus avoid ejection, depends upon when the wrong or breach of duty is committed. This is clearly at the time the ejection takes place. Where the action is for the breach of the contract or duty to carry, this is obviously true. But it is equally true where the action is founded on the neglect or mistake of the carrier's servant in regard to the passenger's ticket. In such case the wrong is not committed until the neglect has resulted in damage; that is to say, until the passenger has been expelled from the train. Negligence without damage is not a wrong.

As between the passenger and the conductor who ejects him the ticket is conclusive evidence as to the passenger's right of passage.<sup>50</sup> If the passenger has not a proper ticket, the conductor may eject him,<sup>51</sup> and, though the carrier is liable for such ejection because it is a natural and probable consequence of the negligence of a prior servant in not furnishing the passenger with a proper ticket, he is not liable for exemplary damages, where the conductor acts considerately in making the ejection.<sup>52</sup> It is generally held, how-

<sup>50</sup> Hale, Bailm. p. 510. See "*Carriers*," *Dec. Dig. (Key No.)* § 356; *Cent. Dig.* §§ 1409-1432.

<sup>51</sup> "If a passenger pay a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that trip, but one in an opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be ground of action against the company as for a tort; but the action may and must be based on the breach of contract to convey the passenger." *MacKay v. Ohio River Ry. Co.*, 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913. See "*Carriers*," *Dec. Dig. (Key No.)* § 356; *Cent. Dig.* §§ 1409-1432.

<sup>52</sup> *Fitzgerald v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 79; *Philadelphia, W. & B. R. Co. v. Hoeflich*, 62 Md. 300, 50 Am. Rep. 223; *Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 663; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Yates v. N. Y. Cent. & H. R. R. Co.*, 67 N. Y. 100; *Tomlinson v. Wilmington & S. R. Co.*, 107 N. C. 327, 12 S. E. 138. See "*Carriers*," *Dec. Dig. (Key No.)* § 382; *Cent. Dig.* §§ 1478, 1489.

ever, that a passenger may recover compensatory damages for mental suffering arising from the indignity of being expelled from a train, even though the conductor acted considerably.<sup>53</sup>

<sup>53</sup> *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Georgia Ry. & Electric Co. v. Baker*, 120 Ga. 991, 48 S. E. 355; *Cleveland, C., C. & St. L. Ry. Co. v. Kensley*, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. Rep. 245; *Lexington & E. Ry. Co. v. Lyons*, 104 Ky. 23, 46 S. W. 209; *Chicago & N. W. Ry. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *Chicago & N. W. Ry. Co. v. Chisholm*, 79 Ill. 584; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Lake Erie & W. Ry. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Shepard v. Chicago, R. I. & P. Ry. Co.*, 77 Iowa, 54, 41 N. W. 564; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. Rep. 589; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Stutz v. Chicago & N. W. Ry. Co.*, 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769; 2 Sedg. Dam. § 865. It has been held that, where the conductor acts considerably, the plaintiff should have felt no sense of insult, and therefore cannot recover damages for the indignity. *Paine v. Chicago, R. I. & P. R. Co.*, 45 Iowa, 569; *Fitzgerald v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 79; *Batterson v. Chicago & G. T. Ry. Co.*, 49 Mich. 184, 13 N. W. 508. Such is not the general rule. See "*Carriers*," *Dec. Dig. (Key No.)* § 382; *Cent. Dig.* § 1487.

## CHAPTER XI

### DAMAGES IN ACTIONS AGAINST TELEGRAPH COMPANIES

- 118. Public Nature.
- 119. Action by Sender.
- 120. Action by Receiver.
- 121-122. Compensatory Damages.
- 123. Proximate and Certain Damages.
- 124. Remote and Speculative Damages.
- 125. Damages not within Contemplation of Parties—Notice of Purpose and Importance of Message.
- 126. Messages Not Understood—Cipher Messages.
- 127. Avoidable Consequences.
- 128. Exemplary Damages.

### PUBLIC NATURE

- 118. Telegraph companies exercise a public calling, and are bound to accept and carefully transmit all messages offered.

Telegraph companies have frequently been termed "common carriers," or common carriers of news or information, and in some respects their liabilities resemble those of a common carrier. It is their duty to accept and transmit messages for all who contract with them for that purpose.<sup>1</sup> It is their duty to enter into such contracts. Accordingly, an action for failure to transmit a message may be regarded either as a breach of contract or as a breach of the public duty; i. e., a tort. In practice, especially under the reform codes of procedure, it is extremely difficult to say whether the action sounds in contract or in tort. Frequently it was held in many cases that telegraph companies as common carriers

<sup>1</sup> *State ex rel. v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *De Rutte v. New York, Albany & Buffalo Electric Magnetic Tel. Co.*, 1 Daly (N. Y.) 547. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 16, 17.

of intelligence were subject to the same absolute liability as exists in the case of common carriers of goods, but there is an essential difference in regard to the subject-matter of the respective contracts.<sup>2</sup> Common carriers actually transport chattels. Telegraph companies really transport nothing. It is merely metaphor to say that they carry intelligence. While it is true that in some jurisdictions they have been declared to be common carriers by constitutional or statutory provisions,<sup>3</sup> and while they are in the nature of common carriers in regard to their quasi public character, and their duty to serve the public generally and without discrimination, they are not, strictly speaking, common carriers,<sup>4</sup> and their obligations and liabilities are not to be measured by the same rules

<sup>2</sup> Common carriers are held to the responsibility of insurers for the safe delivery of the property intrusted to their care upon grounds of public policy, to prevent fraud or collusion with thieves, and because the owner, having surrendered up the possession of his property, is generally unable to show how it was lost or injured. These reasons do not apply to telegraph companies, and they are not held to the responsibility of insurers for the correct transmission and delivery of intelligence. As the value of their service, however, consists in the message being correctly and diligently transmitted, they necessarily engage to do so; and if there is an unreasonable delay, or an error committed, it is presumed to have originated from their negligence, unless they show that it occurred from causes for which they are not answerable. *De Rutte v. New York, Albany & Buffalo Electric Magnetic Tel. Co.*, 1 Daly (N. Y.) 547. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 16, 17.

<sup>3</sup> *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; *Alabama, etc., R. Co. v. Cumberland Tel. Co.*, 88 Miss. 438, 41 South. 258; *Blackwell Milling, etc., Co. v. Western Union Tel. Co.*, 17 Okl. 376, 89 Pac. 235. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* §§ 3, 4.

<sup>4</sup> *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153; *Jacob v. Western Union Tel. Co.*, 135 Mich. 600, 98 N. W. 402; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 16 N. E. 75; *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725; *PRIMROSE v. WESTERN U. TELEG. CO.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, *Cooley, Cas. Damages*, 237. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 3; *Cent. Dig.* §§ 3, 4.



as are applicable to common carriers of goods. While they are liable for negligence in the performance of their public duties, they are not liable as insurers.<sup>5</sup> Like common carriers, telegraph companies may limit their liability by reasonable regulations brought home to the contracting party.<sup>6</sup>

### ACTION BY SENDER

**119. The sender of a message may maintain an action against the company for failure to transmit, or mistake or delay in transmitting, a message.**

Such actions are usually actions of contract, and the ordinary rules as to the measure of damages in actions for breach of contract apply. Every breach of contract is an actionable injury, and for every actionable injury there is an absolute right to damages.<sup>7</sup> If no actual damage can be shown, the party injured may recover nominal damages only; but to this

<sup>5</sup> *PRIMROSE v. WESTERN U. TELEG. CO.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, Cooley, Cas. Damages, 237; *Western Union Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. St. Rep. 448. See "*Telegraphs and Telephones*," Dec. Dig. (Key No.) §§ 36, 37; Cent. Dig. §§ 26-31.

<sup>6</sup> *PRIMROSE v. WESTERN U. TELEG. CO.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 884, Cooley, Cas. Damages, 237; *Holsted v. Postal Tel. Cable Co.*, 193 N. Y. 293, 85 N. Y. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952; *Western Union Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366. But compare *Western Union Tel. Co. v. Eubank*, 100 Ky. 591, 38 S. W. 1068, 26 L. R. A. 711, 68 Am. St. Rep. 361. See "*Telegraphs and Telephones*," Dec. Dig. (Key No.) § 54; Cent. Dig. §§ 39-47.

<sup>7</sup> *Western Union Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283 holding that money paid for the transmission of a telegram may, in the case of nondelivery, be recovered as actual damages. To the same effect, *Kennon v. Western Union Tel. Co.*, 126 N. C. 232, 35 S. E. 468. See "*Telegraphs and Telephones*," Dec. Dig. (Key No.) §§ 59, 60; Cent. Dig. §§ 48-50.

much he is entitled absolutely.<sup>8</sup> He is entitled to nominal damages even though the breach of contract may in fact have been beneficial to him. In *Hibbard v. Telegraph Co.*<sup>9</sup> a telegraph company had failed to deliver a telegram directing the purchase of certain goods, and the sender escaped a loss which he would have sustained had the message been delivered and the goods bought. It was held that he could recover nominal damages, for the company had broken its contract.

### ACTION BY RECEIVER

**120. An action may be maintained by the receiver of a message for damages caused by the company's default in its transmission.**

A telegraph company is liable to the receiver of a message for damages caused by their default in its transmission. This liability is rested sometimes on contract and sometimes on tort. It does not necessarily follow that the contract is made with the person by whom or in whose name a message is sent. He may have no interest in the subject-matter of the message, but the party to whom it is addressed may be the only one interested in its correct or diligent transmission; and where that is the case, he is the one with whom the contract is made.<sup>10</sup> In this respect, actions against telegraph companies are analogous to actions against common carriers. Whether the action against the carrier is to be brought by the consignor or the consignee depends, as a general rule, upon which one the legal right to the property is vested in.

<sup>8</sup> *First Nat. Bank of Barnesville v. Western Union Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485; *Western Union Tel. Co. v. Haley*, 143 Ala. 586, 39 South. 386. See "*Telegraphs and Telephones*," Dec. Dig. (Key No.) § 67; Cent. Dig. §§ 64-68.

<sup>9</sup> 33 Wis. 558, 14 Am. Rep. 775. See "*Telegraphs and Telephones*," Dec. Dig. (Key No.) § 67; Cent. Dig. §§ 64-68.

<sup>10</sup> *De Rutte v. New York, Albany & Buffalo Electric Magnetic Tel. Co.*, 1 Daly (N. Y.) 547. See "*Telegraphs and Telephones*," Dec. Dig. (Key No.) § 56; Cent. Dig. § 37.

If it is vested in the consignee, the consignor, in making the contract with the carrier, is regarded as having acted as the agent of the consignee.<sup>11</sup> Where the action by the consignee is regarded as sounding in tort, the liability is based upon breach of the public duty imposed on telegraph companies to transmit messages. "Every contract made by a telegraph company is made in pursuance of a duty imposed upon it by the state, and any breach of it is not only a breach of contract, but a tort; for the duty assumed involves the performance of this contract, not merely as it affects the sending, but as it affects the delivering. The telegraph company is under a duty to all the world, and breach of its contract with the sender is a breach of this duty, as it affects the receiver."<sup>12</sup> There is negligent or willful conduct resulting in damage, and this, as has been seen, attaches liability.

### COMPENSATORY DAMAGES

- 121. Compensation may be recovered for all losses which are the natural and probable consequence of a default in the transmission of messages.**
- 122. What are natural and probable consequences must be determined with reference to the facts contemplated by the parties.**

#### *Distinction between Tort and Breach of Contract Immaterial*

It is not necessary, where there is no question as to punitive or exemplary damages, to distinguish cases in which the action is one for breach of the contract to transmit and deliver the message from cases in which the action is on the case for the tort in failing to perform the duty devolved on

<sup>11</sup> Hale, Bailm. 543.

<sup>12</sup> Sedg. Dam. 878. In the absence of proof of actual loss, he can recover nominal damages. *Richmond Hosiery Mills v. Western Union Tel. Co.*, 123 Ga. 216, 51 S. E. 290. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 64-68.

the telegraph company under the contract. "The substance and nature of the default and the consequent injury are the same in either view, and, in the absence of circumstances warranting the imposition of punitive damages, the measure of damages must be the same, whatever be the form of the action."<sup>13</sup>

*Damages for Natural and Contemplated Consequences Only*

The liability of telegraph companies is determined under the rules laid down in *Hadley v. Baxendale*.<sup>14</sup> Where the company has no notice of the nature of the transaction, either from the message itself, or from information given it at the time of sending the message, the only damages recoverable are the cost of the message.<sup>15</sup> But, if the company has knowledge of the special circumstances, damages may be recovered accordingly.<sup>16</sup> There is much difficulty in applying the rule of contemplated consequences, owing to the peculiar nature of the contract. Perhaps as often as otherwise the telegraph company knows nothing of the object of the contract or the probable consequences of a breach. Many messages are written in cipher. Some messages disclose more than others. For instance, a message may show, on its face, that it relates to a purchase or sale of goods; but it may give no notice that the purchase or sale was made with reference to a subcontract, while another message might disclose the fact of a subcontract. In one case, therefore, damages for

<sup>13</sup> *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 64-68.

<sup>14</sup> *HADLEY v. BAXENDALE*, 9 Exch. 341, Cooley, *Cas. Damages*, 39. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 64-68.

<sup>15</sup> *Beaupré v. Pacific & A. Tel. Co.*, 21 Minn. 155. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 64-68.

<sup>16</sup> *Hendershot v. Western Union Tel. Co.*, 106 Iowa, 529, 76 N. W. 828, 68 Am. St. Rep. 313; *McPeck v. Western Union Tel. Co.*, 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205; *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775; *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 64-68.

loss on the subcontract might be recovered, while in the other they could not. "The telegraph company usually derives its only knowledge of the object to be effected from the message itself, and hence in some cases is in absolute ignorance, in others has complete knowledge, and in still others can only surmise what the object is, or what the loss in consequence of any mistake or negligence in transmission will be."<sup>17</sup> In this class of cases, therefore, the principal contest is usually as to how far the company can be charged with knowledge of the object of the message. Each case, therefore, must be decided largely upon its own facts.

### **SAME—PROXIMATE AND CERTAIN DAMAGES**

**123. Damages may be recovered for losses sustained or gains prevented where they are the proximate and certain result of defendant's fault.**

**EXCEPTION—Damages cannot be recovered for losses or gains on an unlawful contract.**

Whenever it can be shown that, by reason of a telegraph company's inexcusable failure to send or to deliver a telegram, or of an error in its transmission, the sender has failed to make some gain or profit which he would otherwise have made, or has sustained some loss which he would not otherwise have sustained, and the amount thereof can be shown with certainty, the gain or profit prevented or loss sustained is a proper element of damages in an action against the company for its breach of contract. This, of course, is subject to the qualification laid down in *Hadley v. Baxendale*, that such damage must have arisen naturally from the company's breach of contract itself, or must have been in the contemplation of the parties when they made the contract as a probable result of a breach thereof.

#### *Loss of Sale or Purchase*

In accordance with the general rule, where the negligence

<sup>17</sup> Sedgw. Dam. § 875.

of the telegraph company is the proximate cause of the loss of a sale, if the subject-matter of the sale has a definitely ascertainable market value, the measure of damages for the loss of the sale is the difference between the contract price and the market price of the goods at the place where they were when the seller learned, or with ordinary diligence should have learned, of the failure of the sale.<sup>18</sup> Where by the terms of the contract the delivery is to be made at another time and place, the measure of damages is the difference between the contract price and the market value of the property at the time and place of delivery.<sup>19</sup>

If by reason of the negligence of a telegraph company in regard to the transmission or delivery of a message, a purchase is defeated, resulting in loss to the plaintiff, the measure of damages is the difference between the contract price and the market value of the goods at the time and place of delivery.<sup>20</sup> If, as a result of the telegraph company's negli-

<sup>18</sup> *Western Union Teleg. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *HERRON v. WESTERN UNION TEL. CO.*, 90 Iowa, 129, 57 N. W. 696, Cooley, Cas. Damages, 228; *Western Union Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83; *Thorp v. Western Union Tel. Co.*, 118 Mo. App. 398, 94 S. W. 554; *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644. And see *Western Union Tel. Co. v. Haman*, 2 Tex. Civ. App. 100, 20 S. W. 1133. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 70; *Cent. Dig.* § 72.

<sup>19</sup> *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309. Compare *Evans v. Western Union Tel. Co.*, 102 Iowa, 219, 71 N. W. 219. The cost of transportation must be taken into consideration. *Western Union Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 70; *Cent. Dig.* § 72.

<sup>20</sup> *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Alexander v. Western Union Tel. Co.*, 66 Miss. 161, 5 South. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. Where members of a firm telegraphed another member, who was their buyer, to close an option to purchase cattle at a certain price, and the telegraph company negligently delayed the message, so that it did not arrive until after the option expired, the damage sustained

gence, the purchase is not lost, but delayed, there may as a general rule be a recovery for the rise in market value of the goods during the delay.<sup>21</sup> If the message is from plaintiff to his agent, instructing him to purchase, and there is negligent delay in transmission, plaintiff is entitled to recover the difference between the market price at the time when the message should have been delivered and the price at which the order was in fact executed.<sup>22</sup> Thus, where there was a failure by the telegraph company to deliver a message to buy certain stock which advanced in price between the time when the message should have been delivered and the time it was purchased under another order it was held that the company was liable for the amount of the advance in the price of the stock between those dates.<sup>23</sup> If, however, the message is not a positive direction to the agent to purchase, but leaves the matter to his discretion, or if the agent does not purchase when the message is actually delivered, and no transaction takes place, there can ordinarily be no recovery beyond nominal damages for the amount paid for transmitting the message.<sup>24</sup>

is the difference between the contract price and the market price at the place of purchase on the day on which the option expired, excluding speculative advances in price at later times. *Brewster v. Western Union Tel. Co.*, 65 Ark. 537, 47 S. W. 560. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 70; *Cent. Dig.* § 72.

<sup>21</sup> *Gulf, C. & S. F. Ry. Co. v. Loonie*, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; *Swan v. Western Union Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 70; *Cent. Dig.* § 72.

<sup>22</sup> *Dodd Grocery Co. v. Postal Tel. Cable Co.*, 112 Ga. 685, 37 S. E. 981; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263, 4 Am. Rep. 673; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 70; *Cent. Dig.* § 72.

<sup>23</sup> *Swan v. Western Union Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662. Compare *Hughes v. Western Union Tel. Co.*, 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 66, 67, 72.

<sup>24</sup> *Western Union Tel. Co. v. Fellner*, 58 Ark. 29, 22 S. W. 917,

The illustrations of the application of the general rule as to the recovery of losses sustained and gains prevented are numerous and varied. Thus, where there was a failure to deliver a message directing the sale of cotton owned by the sender, he was allowed to recover the actual damages sustained by a fall in the price of the cotton between the time it would have been sold if the message had been delivered and the time it was actually sold, reasonable diligence having been used to make the sale.<sup>25</sup> Where plaintiff's sale of his horse had failed because of delay in delivering a telegram, and the horse had no regular market value in the neighborhood, and plaintiff had since disposed of him for the best price by reasonable effort attainable, it was held that the plaintiff could recover the difference between the dispatch's offer and the price realized, with cost of keep and interest.<sup>26</sup> Where the sender of a telegram loses a purchase of land by reason of the company's failure to deliver the telegram, he may recover the difference between the price at which the property was offered to him and its actual market value at the time the message should have been delivered.<sup>27</sup> Where there was a failure to transmit a message containing an order for goods, which had, before the delivery of the message to the telegraph company, been sold by the sender, the profits lost by the failure to receive the goods may be recovered.<sup>28</sup> Where a telegraph company neglects to deliver a message to

41 Am. St. Rep. 81; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. See, also, *Brewster v. Western Union Tel. Co.*, 65 Ark. 537, 47 S. W. 560. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 66, 73.

<sup>25</sup> *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 70; *Cent. Dig.* § 72.

<sup>26</sup> *HERRON v. WESTERN UNION TEL. CO.*, 90 Iowa, 129, 57 N. W. 696, Cooley, Cas. Damages, 228. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 70; *Cent. Dig.* § 72.

<sup>27</sup> *Alexander v. Western Union Tel. Co.*, 66 Miss. 161, 5 South. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>28</sup> *Walden v. Western Union Tel. Co.*, 105 Ga. 275, 31 S. E. 172. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.



a live-stock shipper as to the state of the market at a certain point, in consequence of which neglect the shipper sends his stock to the next nearest market, at which he receives 10 cents per 100 less than the market price for the same stock at the first point on the same day, the shipper is entitled to recover from the telegraph company the difference between the market prices of the two points, with the difference in freight added.<sup>29</sup>

#### *Loss of Contract of Service*

If the message is of such character that its delivery would have resulted in a binding contract of employment, and in consequence of the delay or failure of the telegraph company to deliver the message no contract is made, the plaintiff may recover his actual loss, namely, the amount which the other party would have been legally obliged to pay him under the contract, less what he actually made, or could in the exercise of reasonable diligence have made, in similar employment, during the corresponding period.<sup>30</sup> Of course, the plaintiff can recover only for the contract which he actually lost, and not for subsequent renewals of that contract, which, had the parties been mutually satisfied, might or might not have been made.<sup>31</sup> Where the message merely offers an appointment to office, which plaintiff would not have held for any definite length of time, but merely at the will of the

<sup>29</sup> *Western Union Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>30</sup> *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57; *Barker v. Western Union Tel. Co.*, 134 Wis. 147, 114 N. W. 439, 14 L. R. A. (N. S.) 533, 126 Am. St. Rep. 1017; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *McGregor v. Western Union Tel. Co.*, 85 Mo. App. 308. See, also, *Western Union Tel. Co. v. Robinson* (Tex. Civ. App.) 29 S. W. 71; *Western Union Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339. And see *Freeman v. Western Union Tel. Co.*, 93 Ga. 230, 18 S. E. 647. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>31</sup> *Mondon v. Western Union Tel. Co.*, 96 Ga. 499, 23 S. E. 853. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.

person appointing him, only nominal damages can be recovered.<sup>82</sup>

### *Loss of Debt*

If, as a direct result of the telegraph company's negligence, plaintiff loses in whole or in part a debt which otherwise would be collected, he may recover the whole loss.<sup>83</sup> Thus, where a message directing the levy of an attachment is delayed or not delivered, so that other creditors are enabled to obtain prior attachments, which exhaust the assets of the debtor,<sup>84</sup> or where, in a message directing the levy of an attachment, the amount of the claim is changed by an error in transmission, so that the attachment is levied for too small an amount and the balance of the debt is lost,<sup>85</sup> the measure of damages is the amount of the loss.

### *Loss Due to Error in Transmission*

When the loss is due to errors in the transmission of a message, there may be a recovery of the loss actually sustained as the proximate result of the company's negligence; the proper measure of damages necessarily depending on the nature of the transaction and the circumstances of the particular case.<sup>86</sup> Thus, where, in a message quoting a price

<sup>82</sup> *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 35 Pac. 75. And see *Merrill v. Western Union Tel. Co.*, 78 Me. 97, 2 Atl. 847; *Walser v. Western Union Tel. Co.*, 114 N. C. 440, 19 S. E. 366. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>83</sup> *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181; *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790; *Baird v. Western Union Tel. Co.*, 79 S. C. 310, 60 S. E. 695. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>84</sup> *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Fleischner v. Pacific Postal Telegraph Cable Co. (C. C.)* 55 Fed. 738. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>85</sup> *Western Union Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>86</sup> *Bowie v. Western Union Tel. Co.*, 78 S. C. 424, 59 S. E. 65. See, also, *WESTERN UNION TEL. CO. v. MILTON*, 53 Fla.

result of the breach of its contract by the telegraph company, or was in the contemplation of both parties, when they made the contract, as a probable consequence of a breach of it. This qualification is laid down in *Hadley v. Baxendale* and *Griffin v. Colver*.<sup>44</sup>

The damages must be certain in both their nature and the cause from which they proceed, and must be capable of computation with reasonable certainty.<sup>45</sup> Thus, there can be no recovery where plaintiff has not sustained any actual loss, but merely incurred a liability, which may or may not be enforced against him.<sup>46</sup> Under this rule, also, there can be no recovery of damages which are remote, uncertain, speculative, or contingent.<sup>47</sup> This applies to uncertain, speculative, or contingent profits, which might or might not have been made.<sup>48</sup> Thus, profits which might or might not have been

<sup>44</sup> 16 N. Y. 489, 69 Am. Dec. 718. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 67, 68.

<sup>45</sup> *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *Walser v. Western Union Tel. Co.*, 114 N. C. 440, 19 S. E. 366. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 67, 68.

<sup>46</sup> *Pacific Pine Lumber Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103; *Bass v. Postal Tel. Cable Co.*, 127 Ga. 423, 56 S. E. 465, 12 L. R. A. (N. S.) 482. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 67, 68.

<sup>47</sup> *Western Union Tel. Co. v. Watson*, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151; *Bennett v. Western Union Tel. Co.*, 129 Iowa, 607, 106 N. W. 13; *Kiley v. Western Union Tel. Co.*, 39 Hun (N. Y.) 158; *Western v. Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. On the failure to deliver a telegram summoning a physician to attend a patient, nothing but nominal damages and the cost of the message can be recovered, unless it affirmatively appears that if the message had been delivered in time the physician could have come and benefited the patient. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257, 13 S. W. 986; *Beasley v. Western Union Tel. Co. (C. C.)* 39 Fed. 181. And see *Cutts v. Western Union Tel. Co.*, 71 Wis. 46, 36 N. W. 627. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 67, 68.

<sup>48</sup> *WESTERN UNION TEL. CO. v. TWADDELL*, 47 Tex. Civ. App. 51, 103 S. W. 1120, *Cooley, Cas. Damages*, 230; *Western*

made in speculative transactions in stocks, grain, or cotton, which are not carried out, so as to determine the loss, cannot be recovered.<sup>49</sup> So, in an action for negligence in transmitting to plaintiffs a telegram announcing a rise in the price of cotton, whereby plaintiffs sold their cotton for less than they could have obtained, it appeared that the sender was under no legal obligation to inform plaintiffs as to the price of cotton, and that plaintiffs did not rely on receiving information from him. It was held that the damages claimed were too remote.<sup>50</sup>

On the other hand, where, by failure of a telegraph company to deliver a message, plaintiff lost the opportunity to buy for \$3,000 land worth \$5,000, and sought to recover the difference, the damages claimed are not so speculative, remote, or contingent as to absolve the company from liability.<sup>51</sup> And where a telegram to plaintiff to ship mules on a certain day was not delivered within a reasonable time, and plaintiff sustained a loss of a certain amount by not

Union Tel. Co. v. Crall, 39 Kan. 580, 18 Pac. 719; Western Union Tel. Co. v. Lehman & Bro., 106 Md. 318, 67 Atl. 241; Johnson v. Western Union Tel. Co., 79 Miss. 58, 29 South. 787, 89 Am. St. Rep. 584. See "Telegraphs and Telephones," Dec. Dig. (Key No.) § 67; Cent. Dig. §§ 67, 68.

<sup>49</sup> Western Union Tel. Co. v. Fellner, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; Cahn v. Western Union Tel. Co., 48 Fed. 810, 1 C. C. A. 107; Western Union Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. See, also, Cannon v. Western Union Tel. Co., 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590. In Western Union Tel. Co. v. Crall, 39 Kan. 580, 18 Pac. 719, it was held that the loss of anticipated gains on profits based on the probability of plaintiffs horse being able to win prize purses at a trotting race are too remote, contingent, and speculative. See "Telegraphs and Telephones," Dec. Dig. (Key No.) § 67; Cent. Dig. §§ 67, 68.

<sup>50</sup> Frazer v. Western Union Tel. Co., 84 Ala. 487, 4 South. 831. See "Telegraphs and Telephones," Dec. Dig. (Key No.) § 67; Cent. Dig. §§ 67, 68.

<sup>51</sup> Alexander v. Western Union Tel. Co., 66 Miss. 161, 5 South. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556. See "Telegraphs and Telephones," Dec. Dig. (Key No.) § 67; Cent. Dig. §§ 67, 68.

shipping them on that day, the damages were not so remote that plaintiff could not recover.<sup>52</sup>

So, too, where the message relates to a proposed contract between plaintiff and another person, but is neither the acceptance of a previous offer nor the making of a different offer, but merely an invitation to make an offer, or to meet or correspond with the sender for the purpose of further negotiations, damages for the loss of a contract due to the failure of the telegraph company to deliver the message are too remote and uncertain, and only nominal damages can be recovered.<sup>53</sup> Similarly the delay of a telegraph company in delivering a telegram to an attorney, requesting him to take the first train for a neighboring town, but which telegram contained nothing to show why he was wanted at that place, or what injuries would result to him from the delay in delivery, does not enable him to recover the attorney's fees which he might have earned had the dispatch been seasonably delivered, as such rule of damages would cover all possible and improbable consequences arising from the delay in delivering, instead of the probable consequences only.<sup>54</sup>

#### *Money Transfer Messages*

If the telegraph company undertakes for a consideration to pay a sum of money to a person at a distant point and fails to perform its contract, the measure of damages, ordinarily, is interest on the money from the time of default until tender.<sup>55</sup> There cannot, as a rule, be any recovery of special

<sup>52</sup> *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 67, 68.

<sup>53</sup> *Bennett v. Western Union Tel. Co.*, 129 Iowa, 607, 106 N. W. 13. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 67, 68.

<sup>54</sup> *Western Union Tel. Co. v. Clifton*, 68 Miss. 307, 8 South. 746. To the same effect, see *Sweet v. Western Union Tel. Co.*, 139 Mich. 323, 102 N. W. 850. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 67, 68.

<sup>55</sup> *Smith v. Western Union Tel. Co.*, 150 Pa. 561, 24 Atl. 1049; *De Voigler v. Western Union Tel. Co.*, 10 Tex. Civ. App. 229, 30 S. W. 1107. See, also, *Cason v. Western Union Tel. Co.*, 77 S. C. 157, 57 S. E. 722. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 67, 72.

damages based on the fact that, as a result of the failure to receive the money in due time, plaintiff was evicted from home,<sup>56</sup> or injured in reputation<sup>57</sup> or lost credit;<sup>58</sup> such special damages being deemed too remote and not within the contemplation of the parties at the time when the transfer of money was made. But the company may have notice of facts and circumstances which will render it liable in such case for special damages.<sup>59</sup>

**SAME DAMAGES NOT WITHIN CONTEMPLATION  
OF PARTIES—NOTICE OF PURPOSE AND  
IMPORTANCE OF MESSAGE**

**125. Consequential damages, arising out of circumstances not contemplated by both parties, cannot be recovered; but, if enough appears in the message to show that it relates to a commercial business transaction, it is sufficient to charge the company with damages resulting from default in its transmission.**

It will be noticed that the rule laid down in *Hadley v. Baxendale* requires the damages for breach of contract, to be recoverable, must be such as may fairly be considered as arising naturally from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, when they made the contract, as the probable result of the breach of it. If the damages sought to

<sup>56</sup> *Stansell v. Western Union Tel. Co.* (C. C.) 107 Fed. 668. See "*Telegraphs and Telephones*," *Dec. Dig.* (Key No.) §§ 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>57</sup> *Capers v. Western Union Tel. Co.*, 71 S. C. 29, 50 S. E. 537. See "*Telegraphs and Telephones*," *Dec. Dig.* (Key No.) §§ 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>58</sup> *Smith v. Western Union Tel. Co.*, 150 Pa. 561, 24 Atl. 1049. See "*Telegraphs and Telephones*," *Dec. Dig.* (Key No.) § 67, 70; *Cent. Dig.* §§ 67, 72.

<sup>59</sup> *Western Union Tel. Co. v. Wells*, 50 Fla. 474, 39 South. 838, 2 L. R. A. (N. S.) 1072, 111 Am. St. Rep. 129. See "*Telegraphs and Telephones*," *Dec. Dig.* (Key No.) § 67; *Cent. Dig.* § 65.

be recovered may fairly be considered as arising naturally out of the breach of contract itself, the party who has broken the contract will be presumed to have contemplated them as the probable result of a breach. If, on the other hand, the damages sought to be recovered arose out of special circumstances, not disclosed by the contract itself, they cannot be recovered, unless it is shown that such special circumstances were communicated or known to the party who broke the contract, so that they can be considered as having been contemplated when he made the contract.<sup>60</sup>

In *McColl v. Western Union Tel. Co.*<sup>61</sup> the dispatch was as follows: "Can close Valkyria and Othere, 22, 20 net, Montreal. Answer immediately." It was held that the sender could not recover commissions which he would have earned as a broker in effecting a charter of the two vessels named in the dispatch if the message had been duly transmitted, as they were not damages either actually contemplated or to be fairly supposed to have been contemplated by the company. "In the present case," it was said, "the text of the message which the defendants failed to transmit until after a delay of several days indicates upon its face no occasion for special care or the involving of the chartering of two vessels. There was

\* See *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Western Union Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *WESTERN UNION TEL. CO. v. TWADDELL*, 47 Tex. Civ. App. 51, 103 S. W. 1120, *Cooley, Cas. Damages*, 230; *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. Ct. 487; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222, 228; *Dorgan v. Telegraph Co.*, Fed. Cas. No. 4,004; *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *First Nat. Bank of Barnesville v. Western Union Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 65-68.

<sup>61</sup> 44 N. Y. Super. Ct. 487. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 65-68.

no notice or information of any fact given to the defendant, or contained in the message itself, indicating its importance or that special damages would result from any neglect. However strongly the plaintiff may have felt assured, acting as a broker in the matter, that the offer telegraphed to his principals would be accepted, and that he would get his five per cent. commission, yet there is nothing in the case that places these contingencies, in themselves uncertain and remote, within the contemplation of the defendant. It is true the plaintiff's principals might have accepted the offer, and paid the plaintiff the commissions, and their evidence is that they would have accepted it if it had not been delayed by the neglect of the defendant in failing to forward it immediately. The claim of the plaintiff is for a special and contingent loss, and not for such a loss as was the natural and necessary consequence of the defendant's neglect, or such as, from the surrounding circumstances, could even be inferred by the defendant. The decision in *Baldwin v. United States Tel. Co.*,<sup>62</sup> that, where a special purpose is intended by one party, and is unknown to the other, and does not appear by the message itself, in the assessment of damages, such special purpose cannot be taken into consideration, but that the damages must be limited to those resulting from the ordinary and obvious purpose of the contract, governs the case under consideration."<sup>63</sup>

<sup>62</sup> 45 N. Y. 744, 6 Am. Rep. 165. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 65-68.

<sup>63</sup> In *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, plaintiff had deposited with his brokers in New York securities to protect them in the purchase of stock on his account. Several purchases were made by them, of which he had notice. The brokers telegraphed him of another purchase, which telegram defendant failed to deliver. There was a decline in stocks, and plaintiff's margin was exhausted, and his stocks sold at a heavy loss. It was held, in a suit for damages for failure to deliver the telegram, that plaintiff could not recover on the ground that if he had known of the purchase mentioned in the message he would have protected his stock, and saved a portion of his deposit, such consequences not being the ordinary result of a failure to deliver the message, and contemplated when the company agreed to send



On the question as to how far mere indefiniteness in the language of a message will defeat a recovery for consequential

it, and plaintiff could only recover the expense of sending the message.

In *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826,—an action for failure to deliver promptly a message informing the addressee of the death of a relative, so that he was unable to reach the home of the relative in time to attend the funeral—it was held that the expense of exhuming the body, and removing it to another place, was not the proximate result of the failure to deliver the message promptly, since it could neither be foreseen that if the message were not delivered promptly the body would be interred in a place which would be unsatisfactory to the addressee, nor could it be known that in such an event the addressee would wish to exhume it.

In *Western Union Tel. Co. v. J. A. Kemp Grocer Co.* (Tex. Civ. App.) 28 S. W. 905, it was held that a telegraph company failing to deliver a message ordering goods already sold by the sender for future delivery was not liable for loss of profits thereon, in the absence of notice of such sale.

In *Western Union Tel. Co. v. Parlin & Orendorff Co.* (Tex. Civ. App.) 25 S. W. 40, it was held that for failure of a telegraph company to deliver a message stating that the sender would, at a certain time, be at a certain place, the sender could not recover damages for loss of profits on goods which he would have sold the addressee, the company having no notice of the purpose of the message.

In *Western Union Tel. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393, C. left a dispatch at defendant's telegraph office in S., to be forwarded to plaintiff at M. The dispatch was: "Strauss gone to Howard. Gave man gold watch by mistake. Left no word with me. Store closed. Answer." Strauss was a clerk, whom plaintiff had left in charge of his jewelry store in his absence, and during the night or early in the morning, before the dispatch was sent, had robbed the store, and absconded with the property; and the dispatch was in relation to the absconding, but defendant's agent had no notice thereof. The dispatch remained in the S. office an hour and a half, and was then forwarded to the M. office, where it remained two hours before it was delivered, or any effort made to deliver it. Held, that plaintiff could not recover more than the cost of the message and incidental expenses.

In *Cahn v. Western Union Tel. Co.*, 2 U. S. App. 24, 48 Fed. 810, 1 C. C. A. 107, and 48 Fed. 810, it was held that a telegraph company could not be held liable for loss of profits alleged to result from delay in sending a message to sell 200 shares of cer-

damages against a telegraph company, the decisions are not harmonious. There are some cases that go to the extent of

tain stock merely because the operator who received the message for transmission was familiar with the method of dealing on the New York stock exchange, and knew from the message that a "short" sale was intended, which necessarily implied the sending of a subsequent order to buy for the purpose of "covering." It was further held in that case that, where one delivers to a telegraph company for transmission a message to sell 200 shares of certain stock, the legal presumption which the company is authorized to make is that it is an order to sell stock held by the sender, and not that he intended to sell something which he neither had nor proposed to acquire, for such a presumption would involve a violation of the law, as held by some of the highest courts in the country.

In *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744, a message to plaintiff had been delivered to defendant telegraph company reciting that a certain case was set for August 17th. As delivered to plaintiff, it read August 7th. It was held that defendant was liable for plaintiff's reasonable expenses in going to and from the trial, and the value of his time; but that, there being no evidence that the company had notice of special circumstances connected with the sending of the message, it was not liable for loss to plaintiff resulting from the necessity of shutting down his mill, idleness of his teams, etc., during his absence.

In *Barrett v. Western Union Tel. Co.*, 42 Mo. App. 542, it was held that for the failure of a telegraph company to transmit a telegram in relation to a shipment of three loads of cattle, and the cashing of a draft therefor, damages cannot be extended beyond the loss sustained on three loads, as only damages as to such loads might be fairly considered as arising naturally, and to have been in contemplation of the parties to the contract.

In *Western Union Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169, the plaintiff delivered to a telegraph company for transmission a message as follows: "R. [Addressed]. Meet me in C. Saturday night. S."—which was not delivered to R.; and plaintiff brought an action against the company, alleging that by its negligence he was put to expense in hiring a conveyance to go from C. to R.'s home, and back again; that by loss of time he failed to meet important engagements; and that, by reason of exposure, his health was greatly impaired. It was held that the petition was bad on demurrer, the damages being too remote, conjectural, and not in contemplation of the parties, in case of a breach of the contract. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 65-68.

holding that the operator who transmitted the message must have been able to understand its meaning as the sender and party to whom it was sent understood it; otherwise, it is said, he cannot reasonably be supposed to have contemplated damages as the probable consequence of a failure to transmit it.<sup>64</sup> Most of the cases, however, hold that, where enough appears in the message to show that it relates to a commercial business transaction between the correspondents, it is sufficient to charge the company with damages resulting from its negligent transmission or a failure to transmit it.<sup>65</sup> In *Postal Tel. Cable Co. v. Lathrop*<sup>66</sup> the rule was stated to be that "where a message as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written," etc. Where a telegraph message, when read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the

<sup>64</sup> See cases cited, *supra*.

<sup>65</sup> *WESTERN UNION TEL. CO. v. MILTON*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077, Cooley, Cas. Damages, 232; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Id.*, 74 Ill. 168, 24 Am. Rep. 279; *Fererro v. Western Union Tel. Co.*, 9 App. D. C. 455; *Western Union Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *Evans v. Western Union Tel. Co.*, 102 Iowa, 219, 71 N. W. 219; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 302, 41 Am. Rep. 500; *Marr v. Western Union Tel. Co.*, 85 Tenn. 530, 3 S. W. 496; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Hadley v. Western Union Tel. Co.*, 115 Ind. 200, 15 N. E. 845; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Western Union Tel. Co. v. Williford* (Tex. Civ. App.), 27 S. W. 700; *HERRON v. WESTERN UNION TEL. CO.*, 90 Iowa, 129, 57 N. W. 696, Cooley, Cas. Damages, 228. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 65-68.

<sup>66</sup> 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 65-68.

transaction so far as it is necessary to accomplish the purpose for which it is sent, the telegraph company is liable for all direct damages from the negligent failure to transmit or deliver it, as written, within a reasonable time.<sup>67</sup> Thus, where the plaintiffs sued defendant telegraph company for delay in transmitting the message, "You had better come and attend to your claim at once," sent to them by a bank which was holding notes for collection for plaintiffs against a failing debtor. It was held that the language of the message was sufficient, of itself, to indicate to the operator the urgency of the message, so as to bring such matter into the contemplation of the parties in sending the message. And it was further held that the necessity of speed and carefulness was sufficiently shown by the message, without the addition of the names of the debtors, the claims against whom demanded attention.<sup>68</sup> Where a message read, "Buy fifty (50) Northwestern fifty (50) Prairie du Chien, limit forty-five (45)," and there was a delay in its delivery, resulting in a loss to the sender on account of the advance in price of Chicago & Northwestern Railway Company stock, and the Milwaukee & Prairie du Chien Railway Company stock, which the message was intended to order purchased, a recovery was sustained, the court saying: "The dispatch was such as to disclose the nature of the business to which it related, and that the loss might be very likely to occur if there was a want of promptitude in transmitting it, containing the order."<sup>69</sup> In another case an attorney wired wholesale dealers: "Have you claim against P. L. D.? Answer how much." The latter replied: "Yes; one hundred and sixty-one dollars and fifteen cents." It was held that the telegraph company was liable

<sup>67</sup> *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

<sup>68</sup> *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

<sup>69</sup> *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

to such dealers for special damages for failure to deliver such messages within a reasonable time, though it was not informed of their importance otherwise than by their character.<sup>70</sup>

Where the subject to which a telegram relates (as a proposition to sell goods at a given rate) is understood by the company, it is not necessary, in order to make it liable in compensatory damages for negligence in transmission, that the company should be able to foresee the exact amount of pecuniary loss which such negligence is likely to cause.<sup>71</sup> A telegraph company is not relieved from liability for special damage resulting from delay in delivering a message, which prevented plaintiff from entering into certain contracts, by the fact that at the time the message was sent it had no notice of the contracts plaintiff was about to enter into, or the damages liable to arise from such delay.<sup>72</sup>

Of course, when the receiving agent knows personally the purpose and urgency of a message, it need not be shown that notice thereof was given him by the sender, for to give notice thereof would be useless.<sup>73</sup> If the agent knew of the importance of the prompt delivery of the message, or could have discovered it from the terms of the telegram, or from other telegrams in reference to the same matter, the company is chargeable with knowledge of the fact.<sup>74</sup>

<sup>70</sup> *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* §§ 64, 65.

<sup>71</sup> *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699. See, also, *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732, 49 N. W. 707. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

<sup>72</sup> *Gulf, C. & S. F. Ry. Co. v. Loonie*, 82 Tex. 323, 18 S. W. 231, 27 Am. St. Rep. 891. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

<sup>73</sup> *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 36, 37, 67; *Cent. Dig.* § 65.

<sup>74</sup> *Erie Tel. & Tel. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 37, 38, 67; *Cent. Dig.* § 65.

## NOT UNDERSTOOD—CIPHER

not be understood by the  
consequential damages can-  
d.

Some jurisdictions telegraph com-  
held liable for damages caused by  
fault whether or not the result was  
by the company to be probable.

*al Rule*

held, in most jurisdictions, that where a message can-  
be understood by the company's agents, as where it is  
written in cipher, consequential damages cannot be recovered,  
and the company is liable only for nominal damages, or at  
most the price paid for sending the message.<sup>75</sup> All the cases  
which hold that a telegraph company is not liable for conse-  
quential damages for a failure to transmit a dispatch as re-  
ceived, on the ground of indefiniteness or obscurity in the  
language of the message, do so upon the ground that, unless  
the agent of the company may reasonably know from the mes-  
sage itself, or is informed by other means, that it relates to a  
matter of business importance, he cannot be supposed to have  
contemplated damages as a result from his failure to send it  
as written.

The supreme court of Wisconsin, in *Candee v. Western  
Union Tel. Co.*,<sup>76</sup> say: "The operator who receives and who  
represents the company, and may for this purpose be said to  
be the other party to the contract, cannot be supposed to look

<sup>75</sup> *Ferrero v. Western Union Tel. Co.*, 9 App. D. C. 455; *West-  
ern Union Tel. Co. v. Mellor & Barnes*, 33 Tex. Civ. App. 264,  
76 S. W. 449; *Fergusson v. Anglo-American Tel. Co.*, 178 Pa. 377,  
35 Atl. 979, 35 L. R. A. 554, 56 Am. St. Rep. 770; *Wheelock v.  
Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313. See "*Telegraphs  
and Telephones*," *Dec. Dig. (Key No.)* §§ 67, 70; *Cent. Dig.* §§ 65,  
72, 73.

<sup>76</sup> 34 Wis. 472, 17 Am. Rep. 452.

upon such a message as one pertaining to transactions of pecuniary value and importance and in respect to which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of trifling and unimportant character."

In *Postal Tel. Cable Co. v. Lathrop*<sup>77</sup> it is said: "It is clear enough that, applying the rule in *Hadley v. Baxendale*, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would therefore be justifiable in saying it contains no information of value as pertaining to a business transaction, and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss."

In *Western Union Tel. Co. v. Way*<sup>78</sup> it is said that the rule in *Hadley v. Baxendale* "has been universally accepted to mean that liability for damages, in cases of mere breach of contract, must have some necessary relation to what may naturally be expected to follow its violation, or to such results as may be fairly supposed, in the eye of the law, to have entered into the contemplation of the parties when they made the contract. The knowledge which is the basis of this liability, and which imputes notice of the object of the contract, can be derived only in one of two ways: (1) From the face of the message itself; or (2) from extrinsic information imparted by the sender. Unintelligible or cipher dispatches

<sup>77</sup> 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55. Cf. *Western Union Tel. Co. v. Hyer Bros.*, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222, where it was said: "The larger part of all messages sent are of a commercial or business nature, which suggest value. The requirements of friendship or pleasure can await other means of less severity and less expense. If this be true, why should the law assume that, as a rule, all messages sent over it are unimportant, and that an important one is an exception. of which the operator is to be informed?" See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 37, 38, 67; *Cent. Dig.* §§ 33, 65, 70.

<sup>78</sup> 83 Ala. 542, 4 South. 844, per *Sommerville, J.*, dissenting.

give no clue as to the special damage that may result from negligence in transmitting them, and afford no ground for the company to suppose that any loss other than nominal can follow from a failure to send them. The wisdom and justice of the rule is nowhere better illustrated than in the transmission of such dispatches. When the sender elects to studiously conceal from the operator the contents or nature of the message, he thereby deliberately puts the telegraph company in the darkness of ignorance as to the character of the duty imposed upon it, or the magnitude of its liability. The company cannot know, therefore, whether the breach of the obligation will probably be followed by a hundred or a hundred thousand dollars damages. This is both unreasonable and unjust, for telegraph companies are not common carriers or insurers; but their liability, like that of ordinary bailees, is based upon the degree of care or negligence exercised by them in the discharge of their duties. The care and diligence must then, upon every well-settled principle of our jurisprudence, be in proportion to the duty in hand, varying according to the magnitude and nature of the subject-matter of the bailment. Nothing is more important or just, in this view of the subject, than that the law should require the sender at his hazard to disclose the meaning or nature of the message, in order that the company may observe such precautions as may be necessary to guard itself against the risk incident to the duty to be performed."<sup>79</sup>

<sup>79</sup> See *PRIMROSE v. WESTERN UNION TEL. CO.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, Cooley, Cas. Damages, 237; *Birney v. New York & W. Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. Ct. 487; *Daniel v. Western Union Tel. Co.*, 61 Tex. 452, 48 Am. Rep. 305; *First Nat. Bank of Barnesville v. Western Union Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485; *Stevenson v. Telegraph Co.*, 16 U. C. Q. B. 530; *Western Union Tel. Co. v. Martin*, 9 Ill. App. 587; *Sanders v. Stuart*, 1 C. P. Div. 326, 45 Law J. C. P. 682; *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222; *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164,



In *Primrose v. Western Union Tel. Co.*<sup>80</sup> it was held that a telegraph company is not liable to the sender of a message for losses on purchases of wool caused by a mistake in transmitting it, where it was in cipher, wholly unintelligible to the company and its agents, and they were not informed of the nature, importance, or extent of the transaction to which it related, or of the probable consequences, if it were transmitted incorrectly, although they knew that the sender was a wool merchant, and that the person addressed was in his employ.

#### *The Exception*

Some of the courts have taken a contrary view, and have held that a telegraph company which negligently fails to send or to deliver, or which makes a mistake in transmitting, a message, is liable for all the damages naturally flowing from such failure or mistake, though the message was in cipher and its contents uncommunicated and wholly unintelligible to the company.<sup>81</sup> It was said in *Western Union Tel. Co. v.*

71 Am. Dec. 461; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Cannon v. Western Union Tel. Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554; *Behm v. Western Union Tel. Co.*, Fed. Cas. No. 1,234; *Hill v. Western Union Tel. Co.*, 42 S. C. 367, 20 S. E. 135, 46 Am. St. Rep. 734; *Western Union Tel. Co. v. Wilson*, 32 Fla. 527, 14 South. 1, 23 L. R. A. 434, 37 Am. Rep. 125 (overruling *Western Union Tel. Co. v. Hyer Bros.*, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222). See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* §§ 37, 38, 65; *Cent. Dig.* § 66.

<sup>80</sup> *PRIMROSE v. WESTERN UNION TEL. CO.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, *Cas. Damages*, 237. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

<sup>81</sup> *Daughtery v. Telegraph Co.*, 75 Ala. 168; *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *American Union Tel. Co. v. Daughtery*, 89 Ala. 191, 7 South. 660; *Western Union Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *Postal Telegraph Cable Co. v. Lathrop*, 33 Ill. App. 400 (affirmed in 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55); *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Western Union Tel. Co. v. Hyer Bros.*, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 223 (over-

Way<sup>83</sup> that the principle of the *Hadley v. Baxendale* case, construed with reference to the facts of the case and the questions involved, "is that special circumstances, which take the contract out of the usual course of things, must be communicated, in order to become an element of the duty in reference to which the parties are presumed to contract, and, if unknown, damages suffered by reason of the existence of such special circumstances are not recoverable; but that, in all cases, the damages which would naturally, generally, and proximately result from a breach of the contract, 'according to the usual course of things,' are recoverable. Whether or not actually contemplated by the parties, the law conclusively presumes them to have been in their contemplation. Such, as this court understands, is the proper construction to be placed on the words 'in the contemplation of both parties at the time they made the contract,' as employed in the statement of recoverable damages in *Hadley v. Baxendale*." The cases supporting this rule are certainly opposed to the weight of authority, but it is by no means clear that they cannot be sustained on principle. As has been seen, the direct loss caused by a breach of contract may be compensated, even though it was wholly unexpected.<sup>83</sup> The direct damages resulting from breach of contract to transmit a cipher message is the loss of the value of the information contained.<sup>84</sup> This value, and not the consideration paid for sending the message, should be the measure of damages. The rule of *Hadley v. Baxendale* limits liability only for consequential damages. It does not apply to direct damages.

#### *Obscure Messages*

Following the same general rule, it is ordinarily held that, though the message is not in cipher, still if it is so obscure or unintelligible that it conveys no notice to the company of the nature of the loss which is likely to result from a failure

ruled by *Western Union Tel. Co. v. Wilson*, 32 Fla. 527, 14 South. 1, 22 L. R. A. 434, 37 Am. St. Rep. 125). See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

<sup>83</sup> 83 Ala. 542, 4 South. 844.

<sup>84</sup> See ante, p. 47.

<sup>85</sup> *Sedg. Dam.* § 892.

to make due delivery, or that any loss is likely to result at all, recovery must be limited to nominal damages, though there be an actual loss in fact.<sup>85</sup> In the application of the rule, however, a distinction must be made between messages which are wholly unintelligible and those which disclose their importance and general character or purposes, as, for instance, where they show that they relate to a business transaction; it being held that notice of the main purpose is sufficient to charge the company with notice of attendant details.<sup>86</sup>

#### *Abbreviations*

Abbreviations commonly used in trade, and understood, or which ought to be understood, by the telegraph company, do not make a telegram a cipher message.<sup>87</sup>

### **SAME—AVOIDABLE CONSEQUENCES**

#### **127. Plaintiff cannot recover for consequential losses which he could have avoided with reasonable diligence.**

The rule of avoidable consequences<sup>88</sup> applies with full force to contracts with telegraph companies for the transmission

<sup>85</sup> *Western Union Tel. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Jacobs v. Postal Tel. Cable Co.*, 76 Miss. 278, 24 South. 535; *Baldwin v. United States Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Western Union Tel. Co. v. Pratt*, 18 Okl. 274, 89 Pac. 237. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

<sup>86</sup> *Postal Telegraph Cable Co. v. Lathrop*, 33 Ill. App. 400; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; *Western Union Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. 707. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

<sup>87</sup> *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 67; *Cent. Dig.* § 65.

<sup>88</sup> See ante, p. 87.

of messages. The sender or addressee of a telegram, as the case may be, on discovering that it has not been sent or delivered, or that an error has occurred in its transmission, must take all reasonable steps to prevent loss.<sup>89</sup> The law imposes upon a party subjected to injury by the action of another the active duty of making reasonable exertions to render the injury as light as possible. "Where the injury results from breach of contract or unintentional negligence, this obligation to reduce the consequence of the injury by reasonable diligence is positively imposed by every consideration of public interest and sound morality; and if the injured party, through negligence or willfulness, allows the damage to be unnecessarily enhanced, the increased loss falls justly on him."<sup>90</sup> In *Marr v. Western Union Tel. Co.*<sup>91</sup> the plaintiff had delivered to the defendant a message to a broker to buy 1,000 shares of certain stock for him, and by mistake the message was sent for 100 shares only. The plaintiff knew of the mistake the day after the 100 shares had been purchased, but did not renew his order until several days after the stock had advanced. It was held that, for the advance occurring after the plaintiff could have remedied the mistake, the defendant was not responsible. In *Daughtery v. American Union Tel. Co.*<sup>92</sup> the court held that, for failure to deliver a message directing the sale of cotton owned by the sender, he could recover the actual damages sustained by a fall in the price of the cotton between the time when it would have

<sup>89</sup> *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119; *Western Union Tel. Co. v. Truitt*, 5 Ga. App. 809, 63 S. E. 934; *Western Union Tel. Co. v. Jeanes*, 88 Tex. 230, 31 S. W. 186. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 36.

<sup>90</sup> *Marr v. Western Union Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *Leonard v. New York, A. & B. Electro Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 363, 4 Am. Rep. 673. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 36.

<sup>91</sup> 85 Tenn. 529, 3 S. W. 496. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 36.

<sup>92</sup> 75 Ala. 168, 51 Am. Rep. 435. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 36.

been sold if the message had been delivered, and the time it was actually sold, but added the qualification that, as soon as the sender discovered that the message had not been sent, it became his duty, within a reasonable time, to repeat the order or direction to sell, or to take other requisite steps to prevent further loss. In *Western Union Tel. Co. v. Hearne*,<sup>93</sup> an action against a telegraph company for failure to transmit a telegram, whereby the mortgage on plaintiff's property was foreclosed, it was held that plaintiff must show that he could not obtain, from other sources, funds necessary to discharge the debt maturing by failure to send the telegram as agreed. In *Gulf, C. & S. F. Ry. Co. v. Loonie*,<sup>94</sup> which was an action against a telegraph company for failure to deliver a telegram sent by plaintiff, directing that certain building plans be sent to him at C., so as to enable him to conclude contracts for the material to be used in the building, it was held that the refusal to instruct the jury that it was plaintiff's duty to use reasonable efforts to avoid or lessen his damage, and if a reasonably prudent business man would have sent another telegram for the plans, and if such telegram had been sent the plans would have reached plaintiff in time to have consummated his contract, then plaintiff is only entitled to compensation for the value of his time and expense during the extra time he would have been kept at C. on account of the delay, was error.

### EXEMPLARY DAMAGES

**128. Telegraph companies are liable for exemplary damages whenever other defendants would be liable.**

Exemplary or punitive damages are given, not by way of compensation, but by way of punishment, for the purpose of

<sup>93</sup> 7 Tex. Civ. App. 67, 26 S. W. 478. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 36.

<sup>94</sup> 8 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 52; *Cent. Dig.* § 36.

detering the defendant and others from similar acts in the future.<sup>95</sup> They are not allowed for a mere breach of contract.<sup>96</sup> In such cases the damages are compensatory only. Nor are they allowed for mere negligence without any aggravating circumstances. But for negligence that is gross, or any wrong that is willful or malicious, exemplary damages may be recovered in addition to the damages allowed as compensation. This rule applies in all the states to actions against telegraph companies for failure to send or deliver a message, where the action is in tort, and based on the company's negligence. Unless there is a willful breach of duty, or gross negligence, punitive or exemplary damages cannot be allowed.<sup>97</sup> But if, on the other hand, there is gross negligence or willfulness, the company is liable for punitive or exemplary damages in addition to the damage actually sustained.<sup>98</sup> In *McAllen v. Western Union Tel. Co.*<sup>99</sup> it appeared that plaintiff was informed by defendant's agent that there was a telegraph office at the station to which he sent the message, and that the agent soon after sending the message discovered that the office had been closed, but concealed this knowledge from plaintiff. The agent was not informed

<sup>95</sup> See ante, p. 301.

<sup>96</sup> *Western Union Tel. Co. v. Benson*, 159 Ala. 254, 48 South. 712; *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* § 71.

<sup>97</sup> *Cocke v. Western Union Tel. Co.*, 84 Miss. 380, 36 So. 392; *Western Union Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 So. 382; *Western Union Tel. Co. v. Cross' Adm'r*, 116 Ky. 5, 74 S. W. 1098, 76 S. W. 182; *Cloy v. Western Union Tel. Co.*, 78 S. C. 109, 58 S. E. 972. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* § 71.

<sup>98</sup> *Western Union Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283; *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 77 N. W. 985, 43 L. R. A. 581, 74 Am. St. Rep. 502; *Western Union Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Hellams v. Western Union Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* § 71.

<sup>99</sup> 70 Tex. 243, 7 S. W. 715. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* § 71.

that the message, which in form was an ordinary telegram, was of great importance. It was held that exemplary damages could not be recovered. In *West v. Western Union Tel. Co.*<sup>100</sup> it appeared that the telegraph company accepted a written message, and received pay for its immediate transmission and delivery, and the agents of the company failed to transmit or deliver the same, on account of such gross negligence as amounted to wantonness or a malicious purpose, and the company was held liable for exemplary damages in addition to the actual damages sustained.

At common law, exemplary damages cannot be recovered in an action for breach of contract, compensatory damages only being considered in such actions, and therefore exemplary damages could not be recovered against a telegraph company in an action *ex contractu* for failing to send or deliver a message. The action to warrant the allowance of exemplary damages would have to be *ex delicto* for its negligence. The common-law doctrine, however, has been done away with in those states which have abolished by statute the distinction between forms of action. Such is the case, for instance, in Texas. "If the facts stated show a breach of contract, and also that the breach is of such a character as to authorize a suit as for a tort, all the damages recoverable for the thing done or committed, either in an action *ex delicto* or *ex contractu*, may be recovered in the one suit."<sup>101</sup>

<sup>100</sup> 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* § 71.

<sup>101</sup> *Gulf, C. & S. F. Ry. Co. v. Levy*, 59 Tex. 547, 46 Am. Rep. 269; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623. See "*Telegraphs and Telephones*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* § 71.

## CHAPTER XII

### DAMAGES FOR DEATH BY WRONGFUL ACT

- 129. The Rule at Common Law.
- 130-131. Damages in Statutory Action—Pecuniary Loss.
- 132. No Damages for Solatium.
- 133. Exemplary Damages.
- 134. No Damages for Injury to Deceased.
- 135. Medical and Funeral Expenses.
- 136. Prospective Pecuniary Losses.
- 137. Future Care and Support.
- 138-139. Future Services.
- 140. Prospective Benefits.
- 141. Prospective Inheritance.
- 142. Evidence of Pecuniary Condition of Beneficiaries.
- 143. Expectation of Life—Life Tables.
- 144. Interest as Damages.
- 145. Reduction of Damages.
- 146. Discretion of Jury.
- 147. Nominal Damages.
- 148. Allegation of Damages.

### THE RULE AT COMMON LAW

129. At common law no civil action could be maintained for wrongfully causing the death of a human being.

#### *History of Rule*

In 1606, in *Higgins v. Butcher*,<sup>1</sup> where the defendant had assaulted and beaten the plaintiff's wife, from which she died, it was held that the plaintiff could not recover. All the case decided was that, where the person to whom a wrong is done dies, the action dies.<sup>2</sup> The question was not raised again in England until 1808, when, in *Baker v. Bolton*,<sup>3</sup> Lord Ellenborough laid down his famous proposition that, "in a civil court, the death of a human being cannot be com-

<sup>1</sup>Yel. 89.

<sup>2</sup>3 Hutch. Carr. (3d Ed.) § 1376.

<sup>3</sup>1 Camp. 493.



plained of as an injury." The law was extended in *Osborne v. Gillott*,<sup>4</sup> by holding that, while a master can sue for injury done his servant by wrongful act or negligence, whereby the service of the servant is lost to his master, still if the injury result in the servant's death, the master's compensation is gone.<sup>5</sup> The early American cases were not in accord with *Baker v. Bolton*.<sup>6</sup> The common-law rule, however, has been unanimously accepted by the courts of the various states and of the United States.<sup>7</sup>

### *Reason of Rule*

None of the many reasons assigned for the rule has been generally accepted as satisfactory. In England it has been urged that the rule is based on the merger of the wrong re-

<sup>4</sup> L. R. 8 Exch. 88.

<sup>5</sup> But, where death does not at once ensue, the person entitled to the services of the one injured may recover for the loss accruing between the injury and the death, and such action is not barred by the death. *Hyatt v. Adams*, 16 Mich. 180. See "*Death*," *Dec. Dig. (Key No.)* §§ 10, 15, 16; *Cent. Dig.* §§ 17, 18.

<sup>6</sup> *Cross v. Guthery* (1794) 2 Root (Conn.) 90, 1 Am. Dec. 61; *Ford v. Monroe* (1838) 20 Wend. (N. Y.) 210; *Plummer v. Webb* (1825) 1 Ware, 75, Fed. Cas. No. 11,234; *Carey v. Berkshire R. Co.* (1848) 1 Cush. 475, 48 Am. Dec. 616. See *Palfrey v. Portland, S. & P. R. Co.*, 4 Allen (Mass.) 55; *Eden v. Lexington & F. R. Co.* (1853) 14 B. Mon. (Ky.) 204; *James v. Christy* (1853) 18 Mo. 162; *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698; *Chick v. Southwestern R. Co.*, 57 Ga. 357; *McDowell v. Georgia R. R. Co.*, 60 Ga. 320; *Sullivan v. Union Pac. R. Co.*, 3 Dill. 334, Fed. Cas. No. 13,599; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417; *Cutting v. Seabury*, 1 Spr. 522, Fed. Cas. No. 3,521. See "*Death*," *Dec. Dig. (Key No.)* §§ 10, 15, 16; *Cent. Dig.* §§ 17, 18.

<sup>7</sup> *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *City of Eureka v. Merrifield*, 33 Kan. 794, 37 Pac. 113; *Green v. Hudson River R. Co.*, 28 Barb. (N. Y.) 9; *Swift & Co. v. Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; *Jackson v. Pittsburgh, C., C. & St. L. Ry. Co.*, 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192; *Harshman v. Northern Pac. R. Co.*, 14 N. D. 69, 103 N. W. 412; *Insurance Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 680; *Asher v. Cabell*, 1 C. C. A. 693, 50 Fed. 818-824; *The Corsair*, 145 U. S. 335-344, 12 Sup. Ct. 949, 36 L. Ed. 727; *Hyatt v. Adams*, 16 Mich. 180-185 (collecting cases). See "*Death*," *Dec. Dig. (Key No.)* §§ 10, 15, 16; *Cent. Dig.* §§ 17, 18.

sulting in death into the felony involved. The sufficiency of this reason has been denied in England, and in America the doctrine has been generally repudiated.<sup>8</sup> Forfeiture,<sup>9</sup> as an explanation, is as objectionable.<sup>10</sup> "Actio personalis moritur cum persona" is a restatement, and not an explanation, of the rule. Moreover, it does not apply to any one not a party to the action, as the master, parent, or husband.<sup>11</sup> Public policy, that enlightened nations are unwilling to set a price on human life, that the value of life is too great to be estimated in money, or that the law refuses to recognize the interest of one person in the death of another, are all unsatisfactory, if not absurd, reasons.<sup>12</sup> It is of no practical utility to search further for the reason of the rule.<sup>13</sup> The rule is barbarous, and rests on adjudication, in fact.<sup>14</sup>

#### *Right of Action under Statutes*

Except as modified by statute, the common-law rule as to discharge by death remains in force. But, almost universally, direct legislation has practically abrogated the rule by creating a new action. The English statute, known as "Lord Campbell's Act," for compensating the families of per-

<sup>8</sup> *Hyatt v. Adams*, 16 Mich. 180; *Carey v. Berkshire R. Co.*, 1 Cush. (Mass.) 475, 48 Am. Dec. 616; 2 Bish. Crim. Law (2d Ed.) § 370. See "Death," *Dec. Dig. (Key No.)* §§ 10, 11; *Cent. Dig.* §§ 10, 15-18.

<sup>9</sup> *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698. See "Death," *Dec. Dig. (Key No.)* §§ 10, 11; *Cent. Dig.* §§ 10, 15.

<sup>10</sup> *Grosso v. Delaware, L. & W. R. Co.*, 50 N. J. Law, 317, 13 Atl. 233. See "Death," *Dec. Dig. (Key No.)* §§ 10, 11; *Cent. Dig.* §§ 10, 15-18.

<sup>11</sup> *Green v. Hudson R. R. Co.*, \*41 N. Y. 294; *Id.*, 28 Barb. (N. Y.) 9. See "Death," *Dec. Dig. (Key No.)* §§ 10, 11; *Cent. Dig.* §§ 10, 15-18.

<sup>12</sup> *Osborn v. Gillett*, L. R. 8 Exch. 88; *Smith, Neg.* (2d Ed.) 256; *Hyatt v. Adams*, 16 Mich. 180; *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571. See "Death," *Dec. Dig. (Key No.)* §§ 10, 11; *Cent. Dig.* §§ 10, 15-18.

<sup>13</sup> *Leonard, J.*, in *Green v. Hudson R. R. Co.*, \*41 N. Y. 294. See "Death," *Dec. Dig. (Key No.)* §§ 10, 11; *Cent. Dig.* §§ 10, 15-18.

<sup>14</sup> *Pol. Torts*. 53. The rule rests more on artificial distinction than any real principle, and savors more of the logic of the schoolmen than of common sense. *Hyatt v. Adams*, 16 Mich. 180. See "Death," *Dec. Dig. (Key No.)* §§ 10, 11; *Cent. Dig.* §§ 10, 15-18.

sons killed by accident or wrongful act, was passed in 1846.<sup>15</sup> The act provides that "whenever the death of a person shall be caused by wrongful act, neglect or default, and the wrongful act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony"; that "every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; that in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whose benefit such action shall be brought."

Statutes similar to this have been passed by most of the states of the United States of America and by many of the provinces of Canada. These acts do not repeal nor create an exception to the common law. "A totally new action," said Lord Blackburn,<sup>16</sup> "is given against the person who would have been responsible to the deceased if the deceased had lived—an action which \* \* \* is new in its species, new in its quality, new in its principle, in every way new, and

<sup>15</sup> 9 & 10 Vict., c. 93.

<sup>16</sup> *Seward v. The Vera Cruz*, 10 App. Cas. 59; *Pittsburgh, C., C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *MCKAY v. NEW ENGLAND DREDGING CO.*, 92 Me. 454, 43 Atl. 29, *Coolley*, Cas. Damages, p. 254; *Blake v. Railway Co.*, 18 Q. B. 93, 21 Law J. Q. B. 233; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Littlewood v. Mayor, etc., of City of New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Russell v. Sunbury*, 37 Ohio St. 372, 41 Am. Rep. 523; *Hamilton v. Jones*, 125 Ind. 176, 25 N. E. 192; *Hulbert v. City of Topeka (C. C.)* 34 Fed. 510; *Mason v. Union Pac. Ry. Co.*, 7 Utah, 77, 24 Pac. 796. But see *Lyon v. Boston & M. R. Co. (C. C.)* 107 Fed. 386; *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. Rep. 554. See "Death," *Dec. Dig. (Key No.)* § 11; *Cent. Dig.* §§ 10, 15.

which can be brought by a person answering the description of the widow, parent, or child who, under such circumstances, has suffered pecuniary loss."

The constitutionality of the various acts giving a remedy in case of death has not been seriously questioned,<sup>17</sup> but generally sustained, even where the remedy was made to apply exclusively to railroad corporations.<sup>18</sup>

The authorities are about equally divided as to whether these statutes are to be liberally or strictly construed. On the one hand, it is said that they are remedial, and should consequently receive a liberal construction.<sup>19</sup> On the other hand, it is said that they are in derogation of the common law, and should consequently receive a strict interpretation.<sup>20</sup>

### DAMAGES IN STATUTORY ACTION—PECUNIARY LOSS

**130. In an action under Lord Campbell's act, or similar statutes, the damages are measured by the pecuniary loss resulting to the beneficiaries of the action from the death, unless the statute prescribes a different measure.**

<sup>17</sup> *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Board of Internal Improvement of Shelby County v. Searce*, 2 Duv. (Ky.) 576; *Georgia R. & Banking Co. v. Oaks*, 52 Ga. 410. See "Death," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* § 11.

<sup>18</sup> *Boston, C. & M. R. R. v. State*, 32 N. H. 215; *Schoolcraft's Adm'r v. Louisville & N. R. Co.*, 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579. Compare *Smith v. Louisville & N. R. Co.*, 75 Ala. 449. And, generally, see *Denver, S. P. & P. Ry. Co. v. Woodward*, 4 Colo. 162; *Chicago, St. L. & N. O. R. Co. v. Pounds*, 11 Lea (Tenn.) 127. See "Death," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* § 11; "Railroads," *Cent. Dig.* § 774.

<sup>19</sup> *Hunt v. Conner*, 26 Ind. App. 41, 59 N. E. 50; *Haggerty v. Central R. Co.*, 31 N. J. Law, 349; *Beach v. Bay State Co.*, 6 Abb. Prac. (N. Y.) 415. See "Death," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* § 11.

<sup>20</sup> *Chicago Bridge & Iron Co. v. La Manita*, 112 Ill. App. 43; *Jackson v. St. Louis, I. M. & S. Ry. Co.*, 87 Mo. 422, 56 Am. Rep. 460. See "Death," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* § 11.

**131. The term "pecuniary losses" is used in the sense of material, as distinguished from sentimental, losses.**

The distinguishing feature of Lord Campbell's act, and of acts similar to it in respect to damages, is that the damages to be recovered are solely such as result from the death to the persons for whose benefit the action is given. This feature is common to most, but not all, of the acts in force in the United States and Canada. The amount of damages recoverable depends, of course, somewhat upon the language of the statute under which the action is brought.<sup>21</sup> But in spite of differences in phraseology, it is believed that the principles applicable in the measure of damages under all these acts is the same, viz. that the damages are measured by the pecuniary loss resulting to the beneficiaries of the action from the death.<sup>22</sup> This statement, however, is subject to the qualification that certain of the acts authorize exemplary, in addition to compensatory, damages.

<sup>21</sup> Where the statute is a survival statute, the measure of damages is determined as in ordinary actions for personal injuries. 3 Hutch. Carr. § 1397. See "*Death*," *Dec. Dig. (Key No.)* §§ 78, 81; *Cent. Dig.* §§ 97-105.

<sup>22</sup> *Walker v. Lake Shore & M. S. Ry. Co.*, 104 Mich. 606, 63 N. W. 1032; *McKAY v. NEW ENGLAND DREDGING CO.*, 92 Me. 454, 43 Atl. 29, Cooley, Cas. Damages, 254; *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286, 6 S. W. 464; *Diebold v. Sharp*, 19 Ind. App. 474, 49 N. E. 837; *DENVER & R. G. R. CO. v. SPENCER*, 25 Colo. 9, 52 Pac. 211, Cooley, Cas. Damages, 261; *Denver & R. G. R. Co. v. Gunning*, 33 Colo. 280, 80 Pac. 727; *Hunt v. Conner*, 26 Ind. App. 41, 59 N. E. 50; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83; *Richmond v. Chicago & W. M. Ry. Co.*, 87 Mich. 374, 49 N. W. 621; *McGowan v. St. Louis Ore & Steel Co.*, 109 Mo. 518, 19 S. W. 199; *May v. West Jersey & S. R. Co.*, 62 N. J. Law, 67, 42 Atl. 165; *Austin v. Metropolitan St. R. Co.*, 108 App. Div. 249, 95 N. Y. Supp. 740. But see *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509, 22 South. 913, holding that the damages are wholly punitive and for the prevention of homicides, and *Strother v. South Carolina & G. R. Co.*, 47 S. C. 375, 25 S. E. 272, where it is said that the measure of damages is not alone the pecuniary loss. See "*Death*," *Dec. Dig. (Key No.)* § 85; *Cent. Dig.* § 111.

*Meaning of "Pecuniary"*

The use of "pecuniary" to designate the kind of loss for which recovery can be had is misleading, for the damages are by no means confined to the loss of money, or of what can be estimated in money. As will be seen, damages are recoverable for the loss of the services of husband, wife, and child, and also for the loss by a child of the care, education, and counsel which he might have received from his parents. The word has been used rather for the purpose of excluding from the recovery damages to the feelings and affections than of confining the damages strictly to those injuries which are "pecuniary," according to the ordinary definition. The word is used to exclude those injuries to the affections and sentiments which arise from the death of relatives, and those losses which result from the deprivation of the society and companionship, which are incapable of being defined by any recognized measure of value.<sup>23</sup> The meaning would be better expressed by "material," as was suggested by Patterson, J. A., in an opinion in which he carefully reviews all the English decisions.<sup>24</sup> The construction placed upon the word by the courts can only be ascertained by an examination of the various rules which have been evolved for measuring damages, and which differ, according as the action is brought for the benefit of husband, wife, minor child, or parent of a child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.

*Statutes Limiting Amount Recoverable*

In many states the statutes provide that the amount that may be recovered as damages shall not exceed a certain sum. This sum is limited to \$5,000 in Colorado, Connecticut, Maine, and Wisconsin; to \$7,000 in New Hampshire; to \$7,500 in Oregon and Minnesota; and to \$10,000 in Illi-

<sup>23</sup> But see post, p. 431, where contrary doctrine is shown to exist in some states.

<sup>24</sup> Lett v. Railway Co., 11 Ont. App. 1; Patt. Ry. Acc. Law, § 401.

nois, Indiana, Kansas, Massachusetts, Missouri, Oklahoma, South Dakota, Virginia, West Virginia, and the District of Columbia. With these exceptions, the states impose no limit.<sup>25</sup>

### NO DAMAGES FOR SOLATIUM

#### 132. Damages cannot be recovered as a solatium for wounded feelings.

The principle underlying the right to damages given by the various acts is, as has been seen, that compensation is to be made for pecuniary losses resulting from the death. The word "pecuniary" is used to mark the distinction between the losses that can be compensated and those injuries to the affections and sentiments arising from the death of near relatives, which, however painful, cannot be measured or compensated by money.<sup>26</sup> In a leading English case<sup>27</sup> it was said: "The title of this act [Lord Campbell's act] may be some guide to its meaning; and it is 'An act for compensating the families of persons killed,' not for solacing their wounded feelings." And in that case it was held that, in assessing damages, the jury could not take into consideration the mental sufferings of the plaintiff for the loss of her husband, and that, as the damages exceeded any loss sustained by her admitting of a pecuniary estimate, they must be considered excessive. The New York act, and others which have been modeled upon it, require the damages to be assessed with reference to the "pecuniary" injuries. But, irrespective of the use of "pecuniary" in the various enactments, the construction adopted in the case referred to has been almost universally followed, and it is held that the jury

<sup>25</sup> The statutes of Montana, Nebraska, New York, Utah, and Wyoming formerly contained a limitation on the amount recoverable; but those statutes have in recent years been repealed. See "Death," *Dec. Dig. (Key No.)* § 96; *Cent. Dig.* § 122.

<sup>26</sup> *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *Id.*, 29 N. Y. 252, 86 Am. Dec. 297; *Hunt v. Conner*, 26 Ind. App. 41, 59 N. E. 50. See "Death," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>27</sup> *Blake v. Midland Ry. Co.*, 18 Q. B. 93, 21 L. J. Q. B. 233.

are confined to the pecuniary loss, and that nothing can be allowed by way of solatium for the grief and wounded feelings of the beneficiaries,<sup>28</sup> or to compensate them for the

\*This principle is expressly declared in nearly every case in which the measure of damages is discussed. It is sufficient to cite the following: *Smith v. Cissel*, 22 App. D. C. 318; *FLORIDA CENTRAL & P. R. CO. v. FOXWORTH*, 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149, Cooley, Cas. Damages, 242; *O'Fallon Coal Co. v. Laguet*, 89 Ill. App. 13, affirmed 198 Ill. 125, 64 N. E. 767; *Louisville & N. R. Co. v. Creighton*, 106 Ky. 42, 50 S. W. 227; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103, 49 Atl. 418; *Haines v. Pearson*, 107 Mo. App. 481, 81 S. W. 645; *LAZELLE v. TOWN OF NEWFANE*, 70 Vt. 440, 41 Atl. 511, Cooley, Cas. Damages, 263; *McKAY v. NEW ENGLAND DREDGING CO.*, 92 Me. 454, 43 Atl. 29, Cooley, Cas. Damages, 254; *Hunt v. Conner*, 26 Ind. App. 41, 59 N. E. 50; *Illinois C. R. Co. v. Barron*, 5 Wall. 95, 18 L. Ed. 591; *Whiton v. Chicago & N. W. R. Co.*, 2 Biss. 282, Fed. Cas. No. 17,597; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Savannah & M. R. Co. v. Shearer*, 58 Ala. 672; *Little Rock & Ft. S. Ry. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44; *City of Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Conant v. Griffin*, 48 Ill. 410; *City of Chicago v. Scholten*, 75 Ill. 468; *Chicago City Ry. Co. v. Gillam*, 27 Ill. App. 386; *Barley v. Chicago & A. R. Co.*, 4 Biss. 430, Fed. Cas. No. 997; *Brady v. Chicago*, 4 Biss. 448, Fed. Cas. No. 1,796; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83; *State, to use of Coughlon v. Baltimore & O. R. Co.*, 24 Md. 84, 87 Am. Dec. 600; *Mynning v. Detroit L. & N. R. Co.*, 59 Mich. 257, 26 N. W. 514; *Hutchins v. St. Paul, M. & M. Ry. Co.*, 44 Minn. 5, 46 N. W. 79; *Collins v. Davidson (C. C.)* 19 Fed. 83; *Hardy v. Minneapolis & St. L. R. Co. (C. C.)* 36 Fed. 657; *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924; *McGowan v. St. Louis Ore & Steel Co. (Mo. Sup.)* 16 S. W. 236; *Nelson v. Lake Shore & M. S. Ry. Co.*, 104 Mich. 582, 62 N. W. 993; *Atchison, T. & S. F. R. Co. v. Wilson*, 1 C. C. A. 25, 48 Fed. 57; *Besenecker v. Sale*, 8 Mo. App. 211; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, 52 N. W. 840; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *Tilley v. Hudson River R. Co.*, 29 N. Y. 252, 86 Am. Dec. 297; *Id.*, 24 N. Y. 471; *Goss v. Missouri Pac. Ry. Co.*, 50 Mo. App. 614; *Storrie v. Marshall (Tex. Civ. App.)* 27 S. W. 224. The court having charged, in the language of the Code, that a fair and just compensation could be recovered for the pecuniary injuries resulting to the persons for whose benefit the action was brought, a refusal to charge additionally that plaintiff cannot recover for the suffering of the child or for his own mental suffering, and that the jury cannot award punitive damages, is reversible error, as such principles do not sufficiently appear in the instruc-



loss of society or of companionship which they have suffered.<sup>29</sup> A different rule was once declared in Indiana,<sup>30</sup>

tion given. *Dorman v. Broadway R. Co. of Brooklyn Co. (City Ct. Brook.)* 1 N. Y. Supp. 334; *Steel v. Kurtz*, 28 Ohio St. 191; *Au v. New York, L. E. & W. R. Co. (C. C.)* 29 Fed. 72; *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318; *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 393; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335; *March v. Walker*, 48 Tex. 375; *Southern Cotton Press & Mfg. Co. v. Bradley*, 52 Tex. 587; *City of Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Galveston, H. & S. A. Ry. Co. v. Matula*, 79 Tex. 577, 15 S. W. 573; *Taylor, B. & H. Ry. Co. v. Warner*, 84 Tex. 122, 19 S. W. 449, and 20 S. W. 823; *McGown v. International & G. N. Ry. Co.*, 85 Tex. 289, 20 S. W. 80; *Webb v. Denver & R. G. W. Ry. Co.*, 7 Utah, 17, 24 Pac. 616; *Hyde v. Union Pac. Ry. Co.*, 7 Utah, 356, 26 Pac. 979; *Wells v. Denver & R. G. W. Ry. Co.*, 7 Utah, 482, 27 Pac. 688; *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294; *Potter v. Chicago & N. W. Ry. Co.*, 21 Wis. 372, 94 Am. Dec. 548. Under the Scotch law the jury may administer a solatium. *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748. See "*Death*," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>29</sup> *Haines v. Pearson*, 107 Mo. App. 481, 81 S. W. 645; *Illinois Cent. R. Co. v. Bentz*, 108 Tenn. 670, 69 S. W. 317, 58 L. R. A. 690, 91 Am. St. Rep. 763; *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941; *Marshall v. Consolidated Jack Mines Co.*, 119 Mo. App. 270, 95 S. W. 972; *Texas & N. O. R. Co. v. Green*, 42 Tex. Civ. App. 216, 95 S. W. 694; *Hunt v. Conner*, 26 Ind. App. 41, 59 N. E. 50; *Nelson v. Lake Shore & M. S. Ry. Co.*, 104 Mich. 582, 62 N. W. 993; *McKAY v. NEW ENGLAND DREDGING CO.*, 92 Me. 454, 43 Atl. 29, *Cooley, Cas. Damages*, 254; *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924; *Atchison, T. & S. F. R. Co. v. Wilson*, 1 C. C. A. 25, 48 Fed. 57; *Green v. Hudson River R. Co.*, 2 Abb. Dec. (N. Y.) 277, affirming 32 Barb. (N. Y.) 27; *Taylor, B. & H. Ry. Co. v. Warner*, 84 Tex. 122, 19 S. W. 449, and 20 S. W. 823; *McGown v. International & G. N. Ry. Co.*, 85 Tex. 289, 20 S. W. 80; *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 38 Pac. 974; *Gulf, C. & S. F. Ry. Co. v. Finley*, 11 Tex. Civ. App. 64, 32 S. W. 51, and cases in preceding note. In an action by the husband, the court charged that damages should be given as a pecuniary compensation, the jury measuring plaintiff's loss by a just estimate of the wife's services and companionship; that is, by their value in a pecuniary sense, nothing being allowed for plaintiff's wounded feelings. Held, no error, companionship evidently being intended to express service. *Pennsylvania R. Co. v. Goodman*, 62 Pa. 329. See "*Death*," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>30</sup> *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72. This case,

but the later decisions uphold the general rule. In California, too, a different rule seems to prevail. In the earlier cases recovery for loss of society and companionship was allowed.<sup>81</sup> Subsequently in *Morgan v. Southern Pac. Co.*<sup>82</sup> the cases were reviewed, and it was held in accordance with the general rule that the recovery must be limited to the actual pecuniary loss. In a later case,<sup>83</sup> however, the court, distinguishing the *Morgan Case* on the ground that a recovery for loss of society was sought in that case as a distinct element of damages, held that loss of society and companionship may be considered in determining the pecuniary loss. In *Quebec*, also, it was formerly held that damages could be allowed as a solatium;<sup>84</sup> but, under the later decisions, it is held that the damages must be confined to the pecuniary

so far as it holds that damages for anything but the pecuniary injury can be recovered, was disapproved in *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477. *Louisville, N. A. & C. Ry. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010. See, also, *Hunt v. Conner*, 26 Ind. App. 41, 59 N. E. 50; *Commercial Club of Indianapolis v. Hilliker*, 20 Ind. App. 239, 50 N. E. 578. See "*Death*," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

\* *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20; *McKeever v. Market St. R. Co.*, 59 Cal. 294; *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604; *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 320; *Cleary v. City R. Co.*, 76 Cal. 240, 18 Pac. 269. Under the original California act exemplary damages were expressly provided for. *Myers v. City and County of San Francisco*, 42 Cal. 215. See "*Death*," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

\* 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143. See, also, *Munro Pacific Coast Dredging & Reclamation Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577; *Wales v. Pacific Electric Motor Co.*, 130 Cal. 521, 62 Pac. 932, 1120. See "*Death*," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

\* *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972. See, also, *Quill v. Southern Pac. Co.*, 140 Cal. 268, 73 Pac. 991. See "*Death*," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

\* *Ravary v. Railway Co.*, 6 Low. Can. Jur. 49, reversing 1 L. O. Jur. 280. The decision rested on the ground that the right to recover such damages existed under the civil law, and was not abolished by the statute.

loss.<sup>35</sup> In Virginia,<sup>36</sup> West Virginia,<sup>37</sup> Louisiana,<sup>38</sup> and South Carolina,<sup>39</sup> however, the jury are not confined to the pecuniary loss, but may give damages for the loss of society, and by way of solace and comfort for the sorrow, suffering, and mental anguish occasioned by the death. In Florida, loss of society and companionship is regarded as a proper element of damages, though no allowance can be made for sorrow or mental anguish occasioned by death.<sup>40</sup> The gen-

<sup>35</sup> *Canadian Pac. Ry. Co. v. Robinson*, 14 Can. Sup. Ct. 105, reversing 2 M. L. R. Q. B. 25; *City of Montreal v. Labelle*, 14 Can. Sup. Ct. 741. See, also, *Provost v. Jackson*, 13 L. C. Jur. 170; *Ruest v. Railway Co.*, 4 Quebec L. R. 181; *Grand Trunk Ry. Co. v. Ruel*, 1 Leg. News, 129.

<sup>36</sup> *Baltimore & O. R. Co. v. Noell's Adm'r*, 32 Grat. 394; *Matthews v. Warner's Adm'r*, 29 Grat. 570, 26 Am. Rep. 396. The court in the latter case rests its decision on the language of the act which provides that the jury "may award such damages as to it may seem fair and just," and which it says differs from that of other states in not expressly or impliedly limiting the damages to pecuniary loss. Christian, J., says: "I think it is manifest that the legislature intended, as in Kentucky, Iowa, Connecticut, and California (which states are exceptional to the English statute), to allow the jury in such cases to award punitive and exemplary damages." It is to be observed, however, that the Connecticut statute provides for the survival of the original cause of action; that the Kentucky statute expressly provides for punitive damages, and that in Iowa and California the damages are held to be limited to the pecuniary injury. *Bertha Zinc Co. v. Black's Adm'r*, 88 Va. 303, 13 S. E. 452; *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838; *Norfolk & W. R. Co. v. Cheatwood's Adm'r*, 103 Va. 356, 49 S. E. 489. See "Death," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>37</sup> *Turner v. Norfolk & W. R. Co.*, 40 W. Va. 675, 22 S. E. 83; *Kelley v. Ohio River R. Co.*, 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. (N. S.) 898. See "Death," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>38</sup> *Parker v. Crowell & Spencer Lumber Co.*, 115 La. 463, 39 South. 445. See "Death," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>39</sup> *Brown v. Southern R. Co.*, 65 S. C. 260, 43 S. E. 794; *Brickman v. Southern Ry.*, 74 S. C. 306, 54 S. E. 553. See "Death," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>40</sup> *FLORIDA CENT. & P. R. CO. v. FOXWORTH*, 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149, Cooley, Cas. Damages, 242. See "Death," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

eral rule obtains also in states like Iowa,<sup>41</sup> Oregon,<sup>42</sup> and Washington,<sup>43</sup> where the measure of damages is the pecuniary injury to the estate.

### EXEMPLARY DAMAGES

#### 133. Exemplary or punitive damages cannot be recovered, unless expressly authorized by statute.

It follows from the rule that damages must be assessed with reference to the pecuniary loss to the beneficiaries that exemplary or punitive damages cannot be given.<sup>44</sup> They are, however, expressly authorized by the acts of Kentucky, Missouri, South Carolina, Texas, and Washington. In Connecticut,<sup>45</sup> where the right of action of the party injured

<sup>41</sup> *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280, 87 Am. Dec. 391; *Kelley v. Central Railroad of Iowa* (C. C.) 48 Fed. 863. See "*Death*," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>42</sup> *Holmes v. Oregon & C. R. Co.* (D. C.) 5 Fed. 523; *Carlson v. Oregon Short-Line & U. N. Ry. Co.*, 21 Or. 450, 28 Pac. 497; *Ladd v. Foster* (D. C.) 31 Fed. 827. See "*Death*," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>43</sup> *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518. See "*Death*," *Dec. Dig. (Key No.)* §§ 88, 89; *Cent. Dig.* §§ 116, 118.

<sup>44</sup> *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139; *ATCHISON, T. & S. F. RY. CO. v. TOWNSEND*, 71 Kan. 524, 81 Pac. 205, *Cooley, Cas. Damages*, 247; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103, 49 Atl. 418; *Gray v. Little*, 127 N. C. 304, 37 S. E. 270; *McKAY v. NEW ENGLAND DREDGING CO.*, 92 Me. 454, 43 Atl. 29, *Cooley, Cas. Damages*, 254; *Conant v. Griffin*, 48 Ill. 410; *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291; *Hollyday v. The David Reeves*, Fed. Cas. No. 6,625 (5 Hughes, 89); *Holmes v. Oregon & C. R. Co.* (D. C.) 5 Fed. 523; *Wise v. Teerpenning*, 2 Adm. Sel. Cas. (N. Y.) 112; *Pennsylvania R. Co. v. Vandever*, 36 Pa. 298; *Potter v. Chicago & N. W. Ry. Co.*, 21 Wis. 377, 94 Am. Dec. 548. See "*Death*," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 98.

<sup>45</sup> *Murphy v. New York & N. H. R. Co.*, 29 Conn. 496. See "*Death*," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 98.

survives; in Tennessee,<sup>46</sup> under the peculiar statutes of that state; and in Alabama,<sup>47</sup> under the "Act to prevent homicides"—they may be given. It seems that they may also be given in Virginia,<sup>48</sup> under the anomalous construction there adopted. But, even where exemplary damages are authorized, they are not to be given in every case where a recovery of pecuniary damages would be proper.<sup>49</sup> Thus, in Kentucky,<sup>50</sup>

"Haley v. Mobile & O. R. Co., 7 Baxt. 239; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 88 Tenn. 721, 13 S. W. 698. See "Death," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 98.

"The act (Code 1886, § 2589; Code 1907, §§ 2485, 2486) provided for the recovery of "such damages as the jury may assess." The court has said that the purpose of the act is a prevention of homicide, and that this purpose it accomplishes by such pecuniary mulct as the jury deem just. *Richmond & D. R. Co. v. Freeman*, 97 Ala. 289, 11 South. 800. See, also, *McGhee v. McCarley*, 103 Fed. 55, 44 C. C. A. 252; *Louisville & N. R. Co. v. Lansford*, 102 Fed. 62, 42 C. C. A. 160. See "Death," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 98.

"*Matthews v. Warner's Adm'r*, 29 Grat. 570, 26 Am. Rep. 396. See "Death," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 98.

"Under the statute which provides that the jury may give such damages, "pecuniary and exemplary," as may to them seem just, damages resulting from the negligence of defendant, free from moral or legal wrong amounting to willfulness, are limited to actual pecuniary loss. *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936. See "Death," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 98.

"Ky. St. 1909, § 6. *Cincinnati, N. O. & T. P. R. Co. v. Cook's Adm'r*, 113 Ky. 161, 67 S. W. 383. Punitive damages may, but need not, be given. It is error to instruct the jury that they ought to award punitive damages. *Kentucky Cent. R. Co. v. Gastineau's Adm'r*, 83 Ky. 119; *Louisville & N. R. Co. v. Brooks' Adm'r*, 83 Ky. 129, 4 Am. St. Rep. 135. See, also, *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Louisville, C. & L. R. Co. v. Mahony's Adm'r*, 7 Bush (Ky.) 235. Where a brakeman was killed by the willful negligence of a railroad company, a verdict of \$10,000 held not so excessive as to indicate that the jury were influenced by passion or prejudice. *Louisville & N. R. Co. v. Brooks' Adm'r*, 83 Ky. 129, 4 Am. St. Rep. 135. A verdict of \$15,000 is not excessive for the death of a healthy and intelligent young man, 29 years old, who was earning \$2.50 a day, and who was considered one of the best workmen in the company's service. *Louisville & N. R. Co. v. Shivell's Adm'r*, 18 S. W. 944, 13 Ky. Law Rep. 902. See "Death," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 98.

the statute confines them to cases of "willful neglect"; and in Arizona and Texas,<sup>51</sup> to cases of "willful act or omission or gross negligence of the defendant." In Missouri,<sup>52</sup> they cannot be given unless there are "aggravating circumstances."

<sup>51</sup> Sayles' Civ. St. art. 2901. This section is based on Const. art. 16, § 26. The earlier constitutional provision (Const. 1869, art. 12, § 30) did not contain the words "gross neglect." See *Houston & T. Ry. Co. v. Baker*, 57 Tex. 419. The constitutional provisions did not repeal the earlier act, but gave the right to exemplary damages, in the cases named, in addition to compensatory damages. *March v. Walker*, 48 Tex. 372; *Houston & T. C. Ry. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98; *Gohen v. Texas Pac. Ry. Co.*, 2 Woods, 346, Fed. Cas. No. 5,506; *Houston & T. C. Ry. Co. v. Bradley*, 45 Tex. 171. Where both actual and exemplary damages are sought, the allegations should be in the nature of two distinct counts. *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189. Exemplary damages cannot be allowed when the jury do not find actual damages. *Adams v. San Antonio & A. P. R. Co.*, 34 Tex. Civ. App. 413, 79 S. W. 79. See "*Death*," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 98.

<sup>52</sup> Rev. St. 1909 Mo. § 5427, provides that the jury may give such damages, not exceeding \$10,000, as they may deem fair and just, with reference to the necessary injury resulting from such death, and also having regard to the mitigating or aggravating circumstances attending the wrongful act. Former statute, same in substance, has been construed in *Owen v. Brockschmidt*, 54 Mo. 285; *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398. What circumstances will mitigate or aggravate is a question of law, and, if any such exist, they should be pointed out by proper instructions. *Rains v. Railway Co.*, 71 Mo. 164; *Nichols v. Winfrey*, 79 Mo. 544. A general instruction that the jury should have regard to the mitigating and aggravating circumstances is bad, but, if there are no mitigating circumstances, the defendant cannot complain of the instruction for its generality. *Nagel v. Missouri Pac. Ry. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Smith v. Wabasha St. L. & P. Ry. Co.*, 92 Mo. 360, 4 S. W. 129, 1 Am. St. Rep. 729. Such an instruction is erroneous where there are no aggravating circumstances. *Stoher v. St. Louis I. M. & S. Ry. Co.*, 91 Mo. 509, 4 S. W. 389; *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286, 6 S. W. 464. Evidence of contributory negligence will not justify an instruction based on mitigating circumstances. *McGowan v. St. Louis Ore & Steel Co. (Mo.)* 16 S. W. 236. See *Foppiano v. Baker*, 3 Mo. App. 560, Append. Where there are no aggravating circumstances, evidence of the financial condition of defendant is inadmissible. *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508. Rev. St. 1880,

### NO DAMAGES FOR INJURY TO DECEASED

#### 134. Damages cannot be recovered on account of the physical or mental suffering or other injury to the deceased.

Inasmuch as these acts do not transfer the right of action of the party injured to his personal representative, but give a new right of action, in which the damages are to be assessed with reference to the injury resulting from the death to the beneficiaries, nothing can be allowed on account of the physical or mental suffering, or other injury, to the deceased.<sup>53</sup> The rule is, of course, otherwise under the acts

Mo. § 4425, provides for the forfeiture and payment of \$5,000 absolutely in certain cases. Under this section, if plaintiff is entitled to recover at all, he is entitled to recover for the full sum—\$5,000. *Mangan v. Foley*, 33 Mo. App. 250. Where the liability arises under section 4425, Rev. St., an instruction that the jury cannot take into consideration the anguish or suffering of the deceased or of the plaintiff is properly refused. *Tobin v. Missouri Pac. Ry. Co. (Mo.)* 18 S. W. 996. The sum is not intended as a penalty, but as compensatory damages liquidated by the statute. *Coover v. Moore*, 31 Mo. 574. See "*Death*," *Dec. Dig. (Key No.)* § 93; *Cent. Dig.* § 98.

<sup>53</sup> *Jacobs v. Glucose Sugar Refining Co. (C. C.)* 140 Fed. 766; *FLORIDA CENT. & P. R. CO. v. FOXWORTH*, 41 Fla. 1, 25 South. 242, 338, 79 Am. St. Rep. 149, Cooley, *Cas. Damages*, 242; *O'Fallon Coal Co. v. Laquet*, 89 Ill. App. 13, affirmed 198 Ill. 125, 64 N. E. 767; *Oakes v. Maine Cent. R. Co.*, 95 Me. 103, 49 Atl. 418; *West Chicago St. R. Co. v. Foster*, 74 Ill. App. 414, affirmed 175 Ill. 396, 51 N. E. 690; *McKAY v. NEW ENGLAND DREDGING CO.*, 92 Me. 454, 43 Atl. 29, Cooley, *Cas. Damages*, 254; *Blake v. Railway Co.*, 18 Q. B. 93, 21 Law J. Q. B. 233; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. Ed. 591; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280, 87 Am. Dec. 391; *Dwyer v. Chicago St. P. M. & O. Ry. Co.*, 84 Iowa, 479, 51 N. W. 244, 35 Am. St. Rep. 322; *Kelley v. Central Railroad of Iowa (C. C.)* 48 Fed. 663; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *Whitford v. Panama R. Co.*, 23 N. Y. 465, 469; *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Brady v. Chicago*, 4 Biss. 448, Fed. Cas. No. 1,796; *Southern Cotton Press & Mfg. Co.*

of Connecticut, where the original right of action survives,<sup>54</sup> and in New Hampshire,<sup>55</sup> Tennessee,<sup>56</sup> and New Brunswick,

v. Bradley, 53 Tex. 587; Potter v. Chicago & N. W. Ry. Co., 21 Wis. 372, 94 Am. Dec. 548; and cases cited in note 28, supra. See "Death," Dec. Dig. (Key No.) §§ 81-83; Cent. Dig. §§ 103-107.

"Gen. St. 1902, § 1094. The measure of damages appears to be the same as if the action had been brought by the party injured, including punitive damages. Murphy v. New York & N. H. R. Co., 29 Conn. 496; Id., 30 Conn. 184. Such seems also to have been the measure of damages under Acts 1853, c. 74 (Gen. St. Conn. 1866, tit. 7, c. 7, § 544), which is not found in Gen. St. Conn. 1888. Goodsell v. Hartford & N. H. R. Co., 33 Conn. 51; Waldo v. Goodsell, 33 Conn. 432. See Lamphear v. Buckingham, 33 Conn. 237; Carey v. Day, 36 Conn. 152. See "Death," Dec. Dig. (Key No.) §§ 81-83; Cent. Dig. §§ 103-107.

"Pub. St. 1901, c. 191, § 12; Yeaton v. Boston & M. R. R., 73 N. H. 285, 61 Atl. 522. See "Death," Dec. Dig. (Key No.) §§ 81-83; Cent. Dig. §§ 103-107.

"Davidson Benedict Co. v. Stevenson, 109 Tenn. 572, 72 S. W. 967. Code Tenn. § 4029, provides that the plaintiff may recover for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose benefit the action survives from the death. This section is Acts 1883, c. 186. Before this act, only such damages were recoverable as the deceased might have recovered if he had lived (Nashville & C. R. Co. v. Smith, 9 Lea, 471; East Tennessee, V. & G. R. Co. v. Toppins, 10 Lea, 58; Louisville & N. R. Co. v. Conley, 10 Lea, 531; Chicago, St. L. & N. O. R. Co. v. Pounds, 11 Lea, 130; Trafford v. Adams Exp. Co., 8 Lea, 96; East Tennessee, V. & G. R. Co. v. Gurley, 12 Lea, 46), though the earlier cases had held that damages for the loss caused by the death were also recoverable (Nashville & C. R. Co. v. Prince, 2 Heisk. 580; Nashville & C. R. Co. v. Smith, 6 Heisk. 174; Nashville & C. R. Co. v. Stevens, 9 Heisk. 12; Collins v. East Tennessee, V. & G. R. Co., 9 Heisk. 841; East Tennessee, V. & G. R. Co. v. Mitchell, 11 Heisk. 400). Cf. Louisville & N. R. Co. v. Burke, 6 Cold. 45. Contributory negligence of deceased may be shown in mitigation of damages. Louisville & N. R. Co. v. Burke, 6 Cold. 45; Nashville & C. R. Co. v. Smith, 6 Heisk. 174; Louisville & N. Ry. Co. v. Howard, 90 Tenn. 144, 19 S. W. 116. Deceased was 57 years old, in declining health. His monthly earnings were \$25, and his sufferings had not been extreme. The negligence of defendant was not gross, and there was evidence of contributory negligence. Held, that a verdict of \$12,000 was excessive. Snodgrass, J., said: "The principal inquiry is not what is the value of the



where the statutes authorize the jury to consider the suffering of the deceased.

### MEDICAL AND FUNERAL EXPENSES

**135. It is generally, but not universally, held that compensation may be recovered for medical and funeral expenses.**

Since the damages are based solely upon the injury which results from the death, it would logically follow that the expenses of nursing, medical attendance, etc., which result, not from the death, but from the injury causing it, cannot be recovered. It has been frequently held, however, in actions by parents for the death of minor children, that these expenses may be included.<sup>67</sup> As to funeral expenses, it has

life taken. It is whether, and how much, negligence was displayed in taking it, and whether, and to what extent, the negligence of the deceased caused or contributed to it, and, from the reasonable and just compensation to be given upon determining the first inquiry against the negligent wrongdoer, what amount should be deducted on account of the contributing default of the deceased." *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840. On the other hand, \$8,000 damages for the death of a man earning \$4 a day, of industrious and sober habits, with an expectation of life of 31 years, has been held not excessive. *Tennessee Coal & R. Co. v. Roddy*, 85 Tenn. 400, 5 S. W. 286. And where deceased was careful, and the defendant's engineer was very reckless, it was held that a verdict for \$15,000 would not be disturbed. *Chesapeake, O. & S. W. R. Co. v. Hendricks*, 88 Tenn. 710, 13 S. W. 696, 14 S. W. 488. See "*Death*," *Dec. Dig. (Key No.)* §§ 81-83; *Cent. Dig.* §§ 103-107.

<sup>67</sup> *Little Rock & Ft. S. Ry. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Rains v. St. Louis, I. M. & S. Ry. Co.*, 71 Mo. 164, 36 Am. Rep. 459; *Roeder v. Ormsby*, 13 Abb. Prac. (N. Y.) 334; *Id.*, 22 How. Prac. (N. Y.) 270; *Stuebing v. Marshall*, 2 Civ. Proc. R. (N. Y.) 77; *Esher v. Mineral R. & Min. Co.*, 28 Pa. Super. Ct. R. 393; *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318; *Pennsylvania R. Co. v. Bantom*, 54 Pa. 495; *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 393; *Lehigh Iron Co. v. Rupp*, 100 Pa. 95; *Galveston, City of v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85. *Holland v. Brown* (D. C.) 35 Fed. 43, contra. *In International &*

been held in England that they cannot be included.<sup>58</sup> "The subject-matter of the statute," says Willes, J., in *Dalton v. South Eastern R. Co.*, "is compensation for injury by reason of the relative not being alive." In that case the action was for the benefit of a father on account of the death of a minor son, and the verdict was reduced by the amount of the funeral and mourning expenses which the father had paid. In the United States funeral expenses are generally held to be a legitimate element of damages, at least when paid by one of the beneficiaries who was under obligation to pay them.<sup>59</sup> The Minnesota act provides that, out of the money recovered, "funeral expenses, and any demand for the support of the decedent duly allowed by the probate court, shall be first deducted and paid."<sup>60</sup>

*G. N. R. Co. v. Boykin*, 32 Tex. Civ. App. 72, 74 S. W. 93, which was an action for the death of plaintiff's wife, it was held that medical expenses could be recovered. See "*Death*," *Dec. Dig. (Key No.)* § 84; *Cent. Dig.* § 110.

<sup>58</sup> *Dalton v. Railroad Co.*, 4 C. B. (N. S.) 296, 4 Jur. (N. S.) 711, 27 Law J. C. 227. See *Boulter v. Webster*, 13 Wkly. Rep. 289.

<sup>59</sup> *Owen v. Brockschmidt*, 54 Mo. 285; *Southern Ry. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312; *Murphy v. New York Cent. & H. R. R. Co.*, 88 N. Y. 445 (affirming *Id.*, 25 Hun [N. Y.] 311); *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303, 7 S. E. 515; and cases cited in note 57, *supra*. But see *Jackson v. Pittsburgh C. C. & St. L. Ry. Co.*, 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192; *Consolidated Traction Co. v. Hone*, 60 N. J. Law, 444, 38 Atl. 759; *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652. In *Gay v. Winter*, 34 Cal. 153, it was held that if recoverable they must be specially pleaded. See *Bunyea v. Metropolitan R. Co.*, 19 D. C. 76. Husband may recover funeral expenses of wife. *Gulf, C. & S. F. R. Co. v. Southwick* (Tex. Civ. App.) 30 S. W. 692. But see *Wilcox v. Wilmington City Ry. Co.*, 2 Pennewill (Del.) 157, 44 Atl. 686. See "*Death*," *Dec. Dig. (Key No.)* § 84; *Cent. Dig.* § 110.

<sup>60</sup> Rev. Laws, 1905, § 4503. This does not make the fund subject to all debts incurred by the deceased for the support of himself and family, but only to such as were incurred in consequence of, or after, the injury. *State ex rel. v. Probate Court of Dakota County*, 51 Minn. 241, 53 N. W. 463. See *Sykora v. J. I. Case Threshing Mach. Co.*, 59 Minn. 130, 60 N. W. 1008; *Sieber v. Great Northern Ry. Co.*, 76 Minn. 289, 79 N. W. 95. See "*Death*," *Dec. Dig. (Key No.)* § 84; *Cent. Dig.* § 110.

**PROSPECTIVE PECUNIARY LOSSES**

**136. Damages may be recovered for the loss of prospective benefits:**

**(a) Which plaintiff is legally entitled to receive, including:**

- (1) Future care and support; and**
- (2) Future services.**

**(b) Which it is reasonably probable plaintiff would have received, including:**

- (1) Prospective gifts; and**
- (2) Prospective inheritance.**

The loss which a man suffers by the death of a relative may be the loss of something which he was legally entitled to receive, or may be the loss of something which it was merely reasonably probable he would receive. The first description of loss is principally <sup>61</sup> confined to a husband's loss of his wife's services, a wife's loss of her husband's support, a parent's loss of the services of a minor child, a minor child's loss of the support of a parent. But the statutes do not confine the benefit of the action to husbands, wives, minor children, and parents of minor children; and hence a person entitled to the benefit of the action may recover damages for the loss of a pecuniary benefit to which he was not legally entitled, but which it is reasonably probable he would have received except for the death. The second description of loss

<sup>61</sup> But not exclusively. Thus where the deceased had covenanted to pay his mother an annuity during their joint lives, this, of course, furnished a basis for damages. *Rowley v. Railway Co.*, L. R. 8 Exch. 221, 42 Law J. Exch. 153, 29 Law T. (N. S.) 180. And, where the deceased was a child of 8, and his mother lost by his death a pension of \$3 a month, which under the pension laws she drew on his account, it was held that she could recover damages on account of its loss. *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613. See "*Death*," *Dec. Dig. (Key No.)* § 86; *Cent. Dig.* §§ 112-119.

includes the loss by the beneficiary of any pecuniary benefit which he might reasonably have expected to receive during the lifetime of the deceased by gift, and also the loss of any accumulations which it is probable that the deceased would have added to his estate had he lived out his natural life, and which the beneficiary would probably have received by inheritance. Thus the second description of loss may be divided into (1) losses of prospective gifts, and (2) losses of prospective inheritances. The loss sustained by a husband, wife, minor child, and parent of a minor child may be of both descriptions. The loss sustained by an adult child, parent of an adult child, or collateral relative can only be of the latter description.

#### **SAME—FUTURE CARE AND SUPPORT**

- 137. The damages recoverable by a wife or minor child for loss of the care and support of a husband or father is measured by the amount which the deceased would probably have earned during his life for their benefit.**

The pecuniary loss which a wife sustains by the death of a husband, and which a minor child sustains by the death of a father, necessarily includes the loss of support which the deceased owed them respectively.<sup>62</sup> The measure of damages is the amount which the deceased would probably have earned during his life for their benefit, taking into consideration his age, ability, and disposition to work, and habits of living and expenditure.<sup>63</sup> To this may, of course, be added, as in other

<sup>62</sup> Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426; Chicago & A. R. Co. v. May, 108 Ill. 288; Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109; Hunt v. Conner, 26 Ind. App. 41, 59 N. E. 50; Gamache v. Johnston Tin Foil & Metal Co., 116 Mo. App. 596, 92 S. W. 918. See "Death," Dec. Dig. (Key No.) § 86; Cent. Dig. §§ 108-119.

<sup>63</sup> Neal v. Wilmington & N. C. Electric R. Co., 3 Pennewill (Del.) 467, 53 Atl. 338; Chesapeake & O. Ry. Co. v. Lang's Adm'r, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; Norfolk & W. R. Co. v. Cheatwood's Adm'r, 103 Va. 356, 49 S. E. 489; Ward v.

cases, the amount which he would probably have accumulated,

*Dampskibsselskabet Kjoebenhavn* (D. C.) 144 Fed. 524; *Sternfels v. Metropolitan St. R. Co.*, 73 App. Div. 494, 77 N. Y. Supp. 309, affirmed 174 N. Y. 512, 66 N. E. 1117; *Watson v. Seaboard A. L. R. Co.*, 133 N. C. 188, 45 S. E. 555; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335; *Pennsylvania Tel. Co. v. Varnau* (Pa.) 15 Atl. 624; *Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243; *Baltimore & O. R. Co. v. State*, to use of Kelly, 24 Md. 271. *Louisville & N. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609. *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924; *Hogue v. Chicago & A. R. Co.* (C. C.) 32 Fed. 365; *Shaber v. St. Paul, M. & M. Ry. Co.*, 28 Minn. 103, 9 N. W. 575; *Bolinger v. St. Paul & D. R. Co.*, 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680; *Burton v. Wilmington & W. R. Co.*, 82 N. C. 504; *Id.*, 84 N. C. 192; *Blackwell v. Lynchburg & D. R. Co.*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786; *Pool v. Southern Pac. Co.*, 7 Utah, 303, 26 Pac. 654; *Wells v. Denver & R. G. W. Ry. Co.*, 7 Utah, 482, 27 Pac. 688; *Baltimore & O. R. Co. v. Wightman's Adm'r*, 29 Grat. (Va.) 431, 26 Am. Rep. 384; *Soyer v. Great Falls Water Co.*, 15 Mont. 1, 37 Pac. 838; *St. Louis, I. M. & S. Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571. Opportunities of acquiring wealth by change of circumstances in life are not to be considered. *Mansfield Coal & Coke Co. v. McEnery*, 91 Pa. 185, 36 Am. Rep. 662; *Atlanta & W. P. R. Co. v. Newton*, 85 Ga. 517, 11 S. E. 776. See *Christian v. Columbus & R. Ry. Co.*, 90 Ga. 124, 15 S. E. 701. Deceased was a fireman, and evidence was introduced to prove that firemen on defendant's road, when they had acquired sufficient experience and skill, were sometimes promoted to be engineers at increased wages. Held that, as it was not shown that deceased possessed the skill to be an engineer, the admission was error. *Brown v. Chicago B. & Q. Ry. Co.*, 64 Iowa, 652, 21 N. W. 193. But in Texas it is held that it is proper to show what were the deceased's chances of promotion. *Galveston, H. & S. A. R. Co. v. Ford* (Tex. Civ. App.) 46 S. W. 77; *St. Louis, A. & T. Ry. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104; *Texas & P. Ry. Co. v. Robertson*, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; *Gulf, C. & S. F. Ry. Co. v. John*, 9 Tex. Civ. App. 342, 29 S. W. 558. And see *Geary v. Metropolitan St. R. Co.*, 73 App. Div. 441, 77 N. Y. Supp. 54. The standard is not to be fixed by what he was earning when he died. *International & G. N. R. Co. v. Ormond*, 64 Tex. 485; *East Line & R. R. Ry. Co. v. Smith*, 65 Tex. 167. But evidence is not admissible as to a prospective advance in salary based on the prosperity of the employer's business, such prosperity being dependent on a problematic condition of peace or war in Colombia. *Fajardo v. New York Cent. & H. R. R. Co.*, 84 App. Div. 354, 82 N. Y. Supp. 912. See "Death," *Dec. Dig.* (Key No.) § 95; *Cent. Dig.* §§ 108-119.

and which they might reasonably have expected to inherit.<sup>64</sup> The damages to the widow should be calculated upon the basis of their joint lives; the damages to the minor children, for the loss of support, should be confined to their minority.<sup>65</sup> It seems that the pecuniary value of the support of the head of a family cannot be limited to the amount of his wages earned for the benefit of his family, but that his daily services, attention, and care on their behalf may be considered.<sup>66</sup> The testimony in such cases, as also in actions for the death of a minor child, necessarily takes a wider range than when the question is simply whether the beneficiaries have suffered a pecuniary loss, in a strict sense.<sup>67</sup>

<sup>64</sup> See post, p. 471.

<sup>65</sup> *Baltimore & R. Turnpike Road v. State*, 71 Md. 573, 18 Atl. 884, in which the court charged that the jury should estimate the reasonable probabilities of the life of deceased, and give plaintiffs such pecuniary damages as they had suffered, or would suffer, as the direct consequence of deceased's death; that for the children these prospective damages should be estimated to their majority, "and as to the widow, to such probability of life as the jury may find reasonable," and it was held that this was correct, and, no objection being made to the part relating to the widow, it would be assumed that it was understood by the jury as meaning the probable duration of the joint lives of herself and her husband. See, also, *Baltimore & O. R. Co. v. State, to Use of Trainor*, 33 Md. 542; *Baltimore & O. R. Co. v. State, to Use of Woodward*, 41 Md. 268; *Duval v. Hunt*, 34 Fla. 85, 15 South. 876. See "Death," *Dec. Dig. (Key No.)* § 95; *Cent. Dig.* §§ 108-119.

<sup>66</sup> *Bolinger v. St. Paul, & D. R. Co.*, 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680; *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 184, 91 S. W. 763, 113 Am. St. Rep. 85; *Hunt v. Conner*, 26 Ind. App. 41, 59 N. E. 50; *Haines v. Pearson*, 107 Mo. App. 481, 81 S. W. 645; *Walker v. McNeil*, 17 Wash. 582, 50 Pac. 518; *FLORIDA CENT. & P. R. CO. v. FOXWORTH*, 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149, *Cooley, Cas. Damages*, 242. See "Death," *Dec. Dig. (Key No.)* § 95; *Cent. Dig.* §§ 108-119.

<sup>67</sup> *Staal v. Grand Rapids & I. R. Co.*, 57 Mich. 239, 23 N. W. 795. Testimony as to the household and living expenses of decedent's family, by one who had kept the accounts, is competent to show the loss to decedent's family because of his death. *Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243. Evidence that deceased had been in the habit of turning his wages over to his wife was properly admitted for the purpose of showing the loss sustained by de-

Thus evidence is admissible to show the condition of decedent's health at the time of his death,<sup>68</sup> and his character<sup>69</sup> and habits of industry<sup>70</sup> and economy.<sup>71</sup> If it appears that the deceased was apparently able to provide for the support of his family, the court will be slow to set aside a verdict for lack of exact proof.<sup>72</sup> Thus, it is not essential that the de-

ceased's family. *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564. As having reference to the question of the reasonable expectation of pecuniary benefit to the widow, an instruction to the jury that they might consider his capacity to earn money, the injury to his business, his health, and general condition in life, as disclosed by the evidence, is not erroneous. *Clapp v. Minneapolis & St. L. Ry. Co.*, 36 Minn. 6, 29 N. W. 340, 1 Am. St. Rep. 629. Evidence showing what property deceased had when he came to the state 30 years before, what occupation he had followed, how much he had accumulated, and what he was worth at the time of his death, *held* admissible. *Phelps v. Winona & St. P. R. Co.*, 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867. See "*Death*," *Dec. Dig. (Key No.)* § 95; *Cent. Dig.* §§ 108-119.

<sup>68</sup> *Broughel v. Southern New England Tel. Co.*, 73 Conn. 614, 48 Atl. 751, 84 Am. St. Rep. 176; *Coffeyville Mining & Gas Co. v. Carter*, 65 Kan. 565, 70 Pac. 635; *Clapp v. Minneapolis & St. L. Ry. Co.*, 36 Minn. 6, 29 N. W. 340, 1 Am. St. Rep. 629. See "*Death*," *Dec. Dig. (Key No.)* § 66; *Cent. Dig.* § 85.

<sup>69</sup> *Beaumont Traction Co. v. Dilworth* (Tex. Civ. App.) 94 S. W. 352; *McIlwaine v. Metropolitan St. R. Co.*, 74 App. Div. 496, 77 N. Y. Supp. 426; *Standlee v. St. Louis & S. W. R. Co.*, 25 Tex. Civ. App. 340, 60 S. W. 781. See "*Death*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 86, 87.

<sup>70</sup> *Beaumont Traction Co. v. Dilworth* (Tex. Civ. App.) 94 S. W. 352. See "*Death*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 86, 87.

<sup>71</sup> *Central of Georgia R. Co. v. Alexander*, 144 Ala. 257, 40 South. 424. See "*Death*," *Dec. Dig. (Key No.)* § 68; *Cent. Dig.* §§ 86, 87.

<sup>72</sup> Deceased left a wife and three children, two of them minors. He was a strong healthy man, 48 years old, accustomed to earn good wages as a day laborer. *Held*, that a verdict of \$5,000 was not clearly excessive. *Bolinger v. St. Paul & D. R. Co.*, 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680. The deceased was a laboring man, sober and industrious, who provided for his family as best he could under the circumstances, and was 36 years old. He left a widow and six young children. *Held*, that a verdict of \$5,000 was not excessive. *Board Com'rs Howard Co. v. Legg*, 110 Ind. 479, 11 N. E. 612. The deceased was the head of a family, 39 years old, able to perform the duties of fireman, and always at work. *Held*, that the jury were authorized to find more than

ceased should have been actually earning wages at the time of his death;<sup>73</sup> but, in default of such proof, the amount of the verdict will doubtless be more carefully scrutinized.<sup>74</sup> The amount of verdict which will be sustained differs considerably in different jurisdictions.<sup>75</sup>

nominal damages, and that a verdict of \$3,500 was not excessive. *Smith v. Wabash, St. L. & P. Ry. Co.*, 92 Mo. 364, 4 S. W. 129, 1 Am. St. Rep. 729. See "Death," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* §§ 125-130.

<sup>73</sup> Evidence was given of the age, habits, health, and occupation of the deceased, and of the condition of his family, etc., but there was no evidence of the specific wages paid him at the time of his death. *Held*, that the jury were not confined to nominal damages. *Baltimore & O. R. Co. v. State, to Use of Kelly*, 24 Md. 271. Averments showing that deceased was a laboring man, working for defendant (without alleging that he was receiving any compensation for his labor) and that he left no widow, but left a child three years old, *held*, on demurrer, to show sufficiently that such child suffered pecuniary damage by the father's death. *Kelley v. Chicago, M. & St. P. Ry. Co.*, 50 Wis. 381, 7 N. W. 291. See "Death," *Dec. Dig. (Key No.)* § 77; *Cent. Dig.* § 96.

<sup>74</sup> The deceased was a common laborer, who left a widow and several minor children, but what wages he received was not shown. *Held*, that a verdict of \$5,000 was excessive, in view of the absence of evidence that he earned annually so much as the interest on one half that sum. *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290. See "Death," *Dec. Dig. (Key No.)* §§ 77, 99; *Cent. Dig.* §§ 96, 125-130.

<sup>75</sup> Deceased earned \$1 a day, which he always brought home and spent on his wife. The probable duration of his life was 27 years. *Held*, that a verdict of \$2,500 should be reduced to \$1,650. *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 9 South. 870. Deceased was 31 years old, sober and industrious, a druggist, but at the time of his death was laying rails at \$2.50 a day. In an action by the widow, *held* that \$5,000 was not excessive. *Dallas & W. Ry. Co. v. Spicker*, 61 Tex. 427, 48 Am. Rep. 297. A verdict of \$10,000 will not be set aside as excessive, in view of testimony that deceased was a "stout, healthy, and sober" laborer, about 35 years old, earning \$1.25 a day, and that he left a widow and two infant children. *Missouri Pac. Ry. Co. v. Lehmberg*, 75 Tex. 61, 12 S. W. 838. Where the average wages of the deceased were \$125 per month, *held* that a verdict of \$5,000 each in favor of the widow and seven year old daughter, respectively, was not excessive. *St. Louis, A. & T. Ry. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104. The deceased was a healthy and robust man 29 years old,



*Action by Widow—Evidence of Number of Children*

Where the children are included among the beneficiaries, as is the case under most statutes, evidence of their number and ages is, of course, necessary.<sup>76</sup> Where, however, the action is to be brought by the widow in her own name, the question arises whether such evidence is proper. In Pennsylvania, where the widow sues for the benefit of the children, as well as of herself, and the declaration must state who are the parties entitled, such evidence is required.<sup>77</sup> In Missouri, on the other hand, and in some other states, the action, when brought by the widow, is for her sole benefit. It is held, nevertheless, that, as the burden of supporting minor children is imposed upon her, evidence of their number and ages is admissible to show the extent of the burden cast upon her by the death.<sup>78</sup> So, in Wisconsin, although the action is

an engineer, and earning \$125 a month. *Held*, that a verdict in favor of his wife for \$10,000 was not excessive. *Texas & P. Ry. Co. v. Geiger*, 79 Tex. 13, 15 S. W. 214. Where plaintiff's husband was a healthy man, 55 years old, who earned from \$500 to \$1,200 a year, and who had always supported plaintiff, a verdict for \$6,250 actual damages *held* not excessive. *Paschal v. Owen*, 77 Tex. 583, 14 S. W. 203. Deceased was 33 years old, in good health, earning \$14 a week 7 months in the year. *Held*, in a suit for wife and five children, that \$6,000 was not excessive. *Byrd v. Corner*, 6 Chicago Leg. N. 364. Deceased was insolvent and in failing health, but able to superintend his business as innkeeper. Verdict of \$4,000 apportioned among his children *held* excessive. *Hutton v. Windsor*, 34 U. C. Q. B. 487. In suit for wife and children, £3,000 *held* not excessive. *Secord v. Railway Co.*, 15 U. C. Q. B. 631. In suit for wife and children, £5,000 *held* excessive. *Morley v. Railroad Co.*, 16 U. C. Q. B. 504. See "*Death*," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* §§ 125-130.

"*Breckenfelder v. Lake Shore & M. S. Ry. Co.*, 79 Mich. 560, 4 N. W. 957; *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321, reversing (C. C.) 73 Fed. 91. See, also, *Coffeyville Mining & Gas Co. v. Carter*, 65 Kan. 565, 70 Pac. 635. See "*Death*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 86, 87.

"*Huntington & B. T. M. R. & Coal Co. v. Decker*, 84 Pa. 419. See "*Death*," *Dec. Dig. (Key No.)* § 69; *Cent. Dig.* §§ 86, 87.

"*Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; *Soeder v. St. Louis, I. M. & S. Ry. Co.*, 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724; *Atchison, T. &*

for the sole benefit of the widow, and hence an instruction that damages may be allowed to the widow and children is erroneous,<sup>79</sup> the fact that the deceased left children who will be dependent on her may be considered in estimating her damages.<sup>80</sup>

*Death of Parent of Minor—Loss of Education and Personal Training*

The damages for loss of support suffered by a minor child include the loss of such comforts, conveniences, and also of such education as the parent might have been expected to bestow upon him. As the benefit of education, and the enjoyment of the greater comforts and conveniences of life, depend on the possession of pecuniary means to procure them, the loss of these advantages is one which is capable of being estimated in money—in other words, is a pecuniary loss—and therefore the loss of such advantages arising from the death of a father whose income ceases with his life is an injury in respect of which an action can be maintained on the statute.<sup>81</sup> It has frequently been held, however, that damages are not confined to the loss of such education as is procurable

S. F. R. Co. v. Wilson, 1 C. C. A. 25, 48 Fed. 57. Under Rev. St. 1889, § 4425, such evidence is, of course, improper. Schlereth v. Missouri Pac. Ry. Co. (Mo.) 19 S. W. 1134. See "Death," Dec. Dig. (Key No.) § 69; Cent. Dig. §§ 86, 87, 108.

<sup>79</sup>Schadewald v. Milwaukee, L. S. & W. Ry. Co., 55 Wis. 569, 13 N. W. 458; Liermann v. Chicago, M. & St. P. Ry. Co., 82 Wis. 386, 52 N. W. 91, 33 Am. St. Rep. 37. It is error to direct the jury to give damages to recompense the estate of deceased, for such instruction in effect directs them to compensate the children as well as the widow. Gores v. Graff, 77 Wis. 174, 46 N. W. 48. See "Death," Dec. Dig. (Key No.) §§ 32, 69; Cent. Dig. §§ 47, 86, 87, 108.

<sup>80</sup>Mulcairns v. City of Janesville, 67 Wis. 24, 29 N. W. 565; Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910. See "Death," Dec. Dig. (Key No.) § 69; Cent. Dig. §§ 86, 87, 108.

<sup>81</sup>Pym v. Railroad Co., 2 Best & S. 759, 10 Wkly. Rep. 737, 31 Law J. Q. B. 249, affirmed 4 Best & S. 396, 11 Wkly. Rep. 922, 32 Law J. Q. B. 377. See "Death," Dec. Dig. (Key No.) § 86; Cent. Dig. §§ 108-119.

only by pecuniary means, but that they may be given for the loss of the personal care, training, and instruction of a parent, and even of a mother, where the father still survives.<sup>82</sup> A leading case on this subject is *Tilley v. Hudson River R. Co.*,<sup>83</sup> which was an action brought by a father as administrator for the benefit of children for the death of their mother. On the first appeal it was held that the value of the mother's earnings, and the probability that the children would have received an estate increased by such earnings on the death and intestacy of the father, could not be considered; but, upon the second appeal, it was held that evidence of the mother's capacity to bestow upon her children such training, instruction, and education as would be pecuniarily serviceable to them was admissible, and that, as indicating such capacity on her part, it was not improper to admit evidence of her capacity to con-

<sup>82</sup> *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 562, 64 N. E. 1109; *Gamache v. Johnston Tin Foil & Metal Co.*, 116 Mo. App. 596, 92 S. W. 918; *Beaumont Traction Co. v. Dilworth* (Tex. Civ. App.) 94 S. W. 352; *Hoadley v. International Paper Co.*, 72 Vt. 79, 47 Atl. 169; *Sternfels v. Metropolitan St. R.*, 73 App. Div. 494, 77 N. Y. Supp. 309, affirmed in 174 N. Y. 512, 66 N. E. 1117; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *Id.*, 29 N. Y. 252, 86 Am. Dec. 297; *Howard County Board of Com'rs of v. Legg*, 93 Ind. 523, 47 Am. Rep. 390; *Stoher v. St. Louis, I. M. & S. Ry. Co.*, 91 Mo. 509, 4 S. W. 389; *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32, 55 Am. Rep. 292; *Searle v. Kanawha & O. Ry. Co.*, 32 W. Va. 370, 9 S. E. 248; *Baltimore & O. R. Co. v. Wightman's Adm'r*, 29 Grat. (Va.) 431, 26 Am. Rep. 384; *St. Louis, I. M. & S. Ry. Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472. But see *Bradley v. Ohio River & C. R. Co.*, 122 N. C. 972, 30 S. E. 8. In *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290, it was held that while, on principle, an instruction that the jury might consider the loss of instruction and physical, moral, and intellectual training of the father was correct, it should not have been given, because there was no evidence tending to show that the deceased was fitted by education or by disposition to furnish it. Followed in *Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426. To the same effect is *St. Louis & S. F. Ry. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994. See, also, *Baltimore & O. R. Co. v. Stanley*, 54 Ill. App. 215; *St. Louis, I. M. & S. Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571. See "*Death*," *Dec. Dig. (Key No.)* § 86; *Cent. Dig.* §§ 108-119.

<sup>83</sup> 24 N. Y. 471; *Id.*, 29 N. Y. 252, 86 Am. Dec. 297. See "*Death*," *Dec. Dig. (Key No.)* § 86; *Cent. Dig.* §§ 108-119.

duct business and save money. "It is certainly possible," said Hogeboom, J., "and not only so, but highly probable, that a mother's nurture, instruction, and training, if judiciously administered, will operate favorably upon the worldly prospects and pecuniary interests of the child. \* \* \* If they acquire health, knowledge, and a sound bodily constitution, and ample intellectual development, under the judicious training and discipline of a competent and careful mother, it is very likely to tell favorably upon their pecuniary interests."

### **SAME—FUTURE SERVICES**

- 138. The damages recoverable by a husband for the death of his wife include the reasonable value of her services, less the cost of suitably maintaining her.**
- 139. The damages recoverable by a parent for the death of a minor child include the value of the child's services during minority, less the cost of support.**

#### *Death of Wife—Loss of Service*

The pecuniary injury to a husband from the death of a wife necessarily includes the loss of her services, and the measure of damages is their reasonable value,<sup>84</sup> less the cost of suitably maintaining her.<sup>85</sup> Thus, in a case arising under

<sup>84</sup> *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Whiton v. Chicago & N. W. R. Co.*, 2 Biss. 282, Fed. Cas. No. 17,597; *Pennsylvania R. Co. v. Goodman*, 62 Pa. 329; *Dela-ware, L. & W. R. Co. v. Jones*, 128 Pa. 308, 18 Atl. 330; *Lett v. Railway Co.*, 11 Ont. App. 1, reversing *Id.*, 1 Ont. 548. Damages for the death of a wife must be based on the value of her services, and it is incumbent on the plaintiff to prove such services and their value. *Nelson v. Lake Shore & M. S. Ry. Co.*, 104 Mich. 582, 62 N. W. 993. See "Death," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 115.

<sup>85</sup> *Gulf, C. & S. F. R. Co. v. Southwick* (Tex. Civ. App.) 30 S. W. 592. See "Death," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 115.

the Wisconsin statute,<sup>86</sup> the plaintiff proved that his wife was a superior woman, as wife, mother, and in Delaware, *L. & W. R. Co. v. Jones*,<sup>87</sup> the plaintiff introduced evidence to show that the deceased was 66 years old and had always been healthy, and rested. The court refused to rule that this evidence did not show a pecuniary loss, or that the plaintiff could only recover nominal damages; and in the supreme court the lower court was sustained, Sterrett, J., observing that the jury might infer that she was an ordinarily industrious and useful wife. In *Pennsylvania R. Co. v. Goodman*<sup>88</sup> member of society. The court charged the jury (after stating that the damages were confined to the pecuniary loss; that it was impossible to lay down any fixed rule; and that the matter largely rested with the sound reason and discretion of the jury) that, taking all the facts and circumstances into consideration, they might consider the personal qualities, the ability to be useful, of the deceased, and also her capacity to earn money. The jury rendered a verdict of \$5,000, which was held not to be excessive. The defendant having brought the case to the supreme court, the charge was approved, Mr. Justice Field, who delivered the opinion, declaring it to be clear and explicit as to the character of the damages which the jury were authorized to consider. Proof that the deceased actually rendered services is not necessary, but may be

<sup>86</sup> *Whiton v. Chicago & N. W. R. Co.*, Fed. Cas. No. 17,597 [2 Biss. 282]. See "*Death*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 115.

<sup>87</sup> 128 Pa. 308, 18 Atl. 330. But see *Mitchell v. New York Cent. & H. R. R. Co.*, 2 Hun (N. Y.) 535, where a verdict for \$4,000 was set aside as unauthorized by the proof, the only pecuniary loss shown being what might be inferred from the fact that deceased was a married woman and aged 20. See "*Death*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 115.

<sup>88</sup> 62 Pa. 329. The court charged that damages should be given as a pecuniary compensation, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife; that is, by their value in a pecuniary sense, nothing being allowed for the plaintiff's wounded feelings. The charge was sustained, on the ground that "companionship" was evidently used to express the relation of the deceased in the character of the services performed. See "*Death*," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 115.

inferred by the jury. Thus, it is said that the frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children, inasmuch as they render her services more valuable than those of an ordinary servant, are elements which are not to be excluded from the jury in making their estimate of value.

*Death of Minor Child—Loss of Service*

In an action for the benefit of a parent for the death of a minor child the damages necessarily include the loss of the child's services during minority,<sup>89</sup> and the measure of damages is the value of the services less the probable cost of support and maintenance.<sup>90</sup> It is not essential that the child

\* *Texas & P. Ry. Co. v. Wilder*, 92 Fed. 953, 35 C. C. A. 105; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081; *Beaman v. Martha Washington Min. Co.*, 23 Utah, 139, 63 Pac. 631; *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539, 48 N. W. 44; *Little Rock & Ft. S. Ry. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44; *Schnable v. Providence Public Market*, 24 R. I. 477, 53 Atl. 634; *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286, 6 S. W. 464; *City of Chicago v. Keefe*, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860; *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. Rep. 242; *McGovern v. New York & H. R. R. Co.*, 67 N. Y. 417; *Galveston, City of v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Rains v. St. Louis, I. M. & S. Ry. Co.*, 71 Mo. 164, 36 Am. Rep. 459; *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318; *Caldwell v. Brown*, 53 Pa. 453. A widowed mother may recover notwithstanding that she has no right to the services of a minor child, since the act gives her a right of action. *Pennsylvania R. Co. v. Bantom*, 54 Pa. 495. A parent may recover damages for the death of a minor child although the latter never contributed to the parent's support. *Mollie Gibson Consolidated Mining and Milling Co. v. Sharp*, 5 Colo. App. 321, 38 Pac. 850. See "*Death*," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

\* *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Rajnowski v. Detroit B. C. & A. R. Co.*, 74 Mich. 15, 20, 41 N. W. 847, 849; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85; *St. Louis S. W. R. Co. v. Shiftet*, 98 Tex. 102, 81 S. W. 524; *Cleveland, C., C. & St. L. R. Co. v. Miles*, 162 Ind. 646, 70 N. E. 985; *City of Elwood v. Addison*, 26 Ind. App. 28, 59 N. E. 47. The value of the services is to be without regard to any peculiar value which the parent might attach to them. *St. Louis, I. M. & S. Ry. Co. v. Freeman*, 36 Ark. 41. See "*Death*," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

should ever have earned anything. Thus, in *Duckworth v. Johnson*,<sup>91</sup> a father, who was a working man, sued for the death of a son 14 years of age, who had earned 4s. a week for a year or more, but who, at the time of his death, was without employment. There was no evidence of the cost of boarding and clothing him, and the judge left it to the jury to say whether the plaintiff had sustained any pecuniary loss by the death; and, the jury having found a verdict of £20, it was held that the plaintiff was entitled to retain it. In *Bramall v. Lees*<sup>92</sup> a father recovered £15 for the death of a daughter 12 years old, who had never actually earned anything, but who might, if she had lived, have obtained work in a factory. So, in *Condon v. Railway Co.*,<sup>93</sup> a widow recovered £10 for the death of a son of 14, who had never earned anything, but whose capabilities were valued at 6d. a day.

<sup>91</sup> 4 Hurl. & N. 653, 29 L. J. Exch. 25, 5 Jur. (N. S.) 630. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>92</sup> 29 L. T. 111. See *Chapman v. Rothwell*, 4 Jur. (N. S.) 1180, where Crompton, J., comments upon the case with approval. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>93</sup> 16 Ir. Com. Law, 415. See *Burke v. Railroad Co.*, 10 Cent. Law J. 48. In an action by a father for the death of his daughter, aged 10, it was proved that deceased lived with her parents, and was maintained by them, rendering services which enabled them to dispense with a servant. No evidence was given of the exact value of her services, or as to the cost of her maintenance. *Held*, that there was evidence for the jury, but a verdict for £150 should be reduced to £50. *Wolfe v. Railway Co.*, 26 L. R. Ir. 548. The plaintiff's father and stepmother were killed simultaneously. An action for the loss of the father had been instituted in which £100 was obtained; but 1s. only was allocated to plaintiff, who sued in a second action for the death of her stepmother. The parties were in humble life. The stepmother earned 6s. a week besides her food, which earnings were applied to the support of the family. Plaintiff resided with her father and stepmother. For six months preceding the death she earned 5s. a week, but previously had not been able to work from weakness of health. *Held*, that a verdict in the former case was no bar; also that there was evidence of pecuniary loss sufficient to sustain the action. *Johnston v. Railway Co.*, 26 L. R. Ir. 691. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 105-115.

In no English case does it appear that damages have been given for the death of a child of such tender years as to be incapable of earning wages. But in the United States it is well settled that substantial damages may be recovered in such cases. *Ihl v. Forty-Second St. & G. St. Ferry R. Co.*<sup>94</sup> is a leading case in point. The action was brought for the death of a child three years old, and the verdict was \$1,800. The court of appeals sustained the lower court in refusing to nonsuit the plaintiff, or to direct a verdict for nominal damages, for absence of proof of pecuniary damages to the next of kin. "It was within the province of the jury," said Rapallo, J., "who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. Except in very rare instances, it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years; and to hold that, without such proof, the plaintiff could not recover, would, in effect, render the statute nugatory in most cases of this description. It cannot be said, as a matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject beyond the age and sex of the child, the circumstances and condition in life of the parents, or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion." He adds that the amount of damages could have been reviewed in the court below, but could not in the court of appeals; the only question for the higher court being whether any, or more than nominal, damages could be recovered.<sup>95</sup>

<sup>94</sup> 47 N. Y. 317, 7 Am. Rep. 450. See "*Death*," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 94-115.

<sup>95</sup> In *Lehman v. City of Brooklyn*, 29 Barb. (N. Y.) 234, a stricter



In conformity with the views expressed in *Ihl v. Forty-Second St. Ry. Co.*, it is established that the jury may infer

construction of the statute was adopted. In that case *Brown, J.*, held that a verdict of \$1,500 for a child of four years was excessive, and forcibly states the argument against the allowance of substantial damages in such cases: "For the next ten years," he says, "had he lived, it may safely be said that he would have been a burden in place of a benefit, pecuniarily, to his parents. And for the next seven years after that, if educated to a profession or mercantile calling, or put to a trade, he would have done well—much better than the majority of lads—if he supported himself. During all this time he would have been exposed to disease and death. \* \* \* The life of this little boy, however priceless may have been its value in other aspects, had no pecuniary value which the jury could justly estimate at \$1,500. If the plaintiff recovered at all, the damages should have been nominal." But this decision is opposed to the decisions earlier and later. Indeed, in actions for the death of minor children, as in other actions under the statute, the New York courts have gone farther than those of any other state in yielding the question of damages to the discretion of the jury. Thus in *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310, affirming 3 E. D. Smith (N. Y.) 103, which was an action for the death of a daughter six years old, the judge charged that the plaintiff could recover whatever pecuniary loss the next of kin (the mother) might be supposed to incur in consequence of the loss of the child, and qualified this by adding that the jury were to give what they should deem fair and just, with reference to the pecuniary injury resulting from the death. The judge also excluded all considerations arising from the suffering of the child or the anguish of the parents, and confined the rule of damages exclusively to indemnification for a pecuniary loss. This instruction was sustained by the court of appeals. *Wright, J.*, observing that it was only another way of instructing the jury that the damages were a sum which, in their opinion, taking into consideration all the circumstances of the case, would be the pecuniary loss to the next of kin. "This," he concludes, "was right, unless the statute limits the recovery to the actual loss proved at the trial. We think it does not." See *Quin v. Moore*, 15 N. Y. 432. In *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445, 98 Am. Dec. 780, the jury rendered a verdict of \$1,500 for a boy 11 years old. The defendant moved for a new trial on the ground that there was no evidence of the pecuniary value of the life, which was denied, and in the court of appeals the lower court was sustained, *Hunt, C. J.*, observing that the jury would have the right, acting upon their own knowledge, and without proof, to say that the services of a boy from 11 until 21 years of age were valu-

the amount of loss from proof of the age, sex, and condition in life of the deceased child, and that testimony as to the

able to his father, and to estimate their value. The court went to the extreme length in *Houghkirk v. President, etc., of Delaware & H. Canal Co.*, 93 N. Y. 219, 44 Am. Rep. 370; *Id.*, 28 Hun (N. Y.) 407 (general term); *Id.*, 11 Abb. N. C. (N. Y.) 72, *Id.*, 63 How. Prac. (N. Y.) 328 (special term)—in which case a verdict of \$5,000 was rendered for an only child 6 years old, intelligent and healthy, the daughter of a market gardener—these facts and the circumstance of her death constituting the only evidence. The general term declined to set the verdict aside as excessive, and the court of appeals declared that it was impossible to say that error had been committed thereby, although it granted a new trial on another ground. In the opinion of the court at general term the difficulty of any court called upon to review the damages in such cases is clearly set forth as follows: "The court in that case" (*Ihl v. Forty-Second St. & G. St. Ferry R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450) "says that the damages could be reviewed in this court. But the difficulty is, by what test are we to review them? If it is a matter of guess work, the jury can guess as well as we. If we are to review them by the test of the evidence, then the difficulty is that there is no direct evidence proving the amount of loss. The facts to which the consideration of the jury is limited by the case cited would be, in the present case, substantially and in brief: A girl of six years, healthy and bright, only child of a gardener and his wife, both of whom survived her. Given her death; what is their pecuniary loss?" Referring to the position taken by the general term, that the doctrine of the court of appeals leaves it impossible for a court to say in any instance that damages are excessive, Finch, J., who delivered the opinion of the court of appeals, says: "The damages to the next of kin \* \* \* are necessarily indefinite, prospective, and contingent. They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. But even in such case there is, and there must be, some basis in the proof for the estimate, and that was given here, and always has been given. Human lives are not all of the same value to the survivors. The age and sex, the general health and intelligence, of the person killed, the situation and condition of the survivors, and their relation to the deceased,—these elements furnish some basis for judgment. That it is slender and inadequate is true; but it is all that is possible, and, while that should be given, more cannot be required. Upon that basis and from such proof the jury must judge; and, having done so, it is possible, though not entirely easy, for the general term to review such judgment, and set it aside if it appears excessive, or the re-

value of the services is unnecessary,<sup>96</sup> though perhaps not improper.<sup>97</sup> It would seem, however, that such proof would not dispense with the necessity of evidence showing the expectancy of life of the parents.<sup>98</sup> It is said in some of the cases that where the deceased is a minor, and leaves a parent entitled to his services, the law presumes a loss for which more than nominal damages can be recovered.<sup>99</sup> Such dam-

sult of sympathy and prejudice." In *Ahern v. Steele*, 48 Hun, 517, 1 N. Y. Supp. 259, in sustaining a verdict of \$4,500 for a child of six, Van Brunt, P. J., remarked: "The damages appear to be excessive, as it does not seem that there can be any pecuniary damage resulting from the death of so young a child; \* \* \* but as recoveries have been sustained, based on the death of much younger children, we see no reason for interference with the verdict upon this account." *Gorham v. New York Cent. & H. R. R. Co.*, 23 Hun (N. Y.) 449; *Huerzeler v. Central C. T. R. Co.*, 1 Misc. Rep. 136, 20 N. Y. Supp. 676. But in *Carpenter v. Buffalo N. Y. & P. R. Co.*, 38 Hun (N. Y.) 116, it was held that a verdict could not be sustained on evidence merely of the relationship, age, and habits of the child, when there was no evidence of the condition, pecuniary and physical, of the parents or of their age. See, also, *Gill v. Rochester & P. R. Co.*, 37 Hun (N. Y.) 107; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 105-118.

<sup>96</sup> *Little Rock & Ft. S. Ry. Co. v. Barker*, 39 Ark. 491; *City of Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *City of Chicago v. Scholten*, 75 Ill. 468; *City of Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378; *Union Pac. Ry. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501; *Nagel v. Missouri Pac. Ry. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Grogan v. Broadway Foundry Co.*, 87 Mo. 321; *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85. *Austin Rapid Transit R. Co. v. Cullen* (Tex. Civ. App.) 29 S. W. 256. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-119.

<sup>97</sup> *Rajnowski v. Detroit B. C. & A. R. Co.*, 74 Mich. 15, 20, 41 N. W. 847, 849; *Pennsylvania Coal Co. v. Nee* (Pa.) 13 Atl. 841; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315. See, also, *Klanowski v. Grand Trunk R. Co.*, 57 Mich. 525, 24 N. W. 801. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-119.

<sup>98</sup> *Carpenter v. Buffalo N. Y. & P. R. Co.*, 38 Hun (N. Y.) 116. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-119.

<sup>99</sup> Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship will warrant a recovery of nominal damages only; but where the deceased is a minor, and leaves a father entitled to his

proof of the personal character, and habits of industry.<sup>100</sup> The services which the child rendered to the family, including acts of administration to the community, in the nature of the case, juries are to apply precise rules in estimating damages for the services of young children.<sup>102</sup> Nevertheless, courts exercise their right to set aside verdicts, though upon what principle and how it is often difficult to understand. The character of the supervision exercised is illustrated by the following cases.<sup>103</sup>

In *Chicago v. Scholten*, 75 Ill. 468, *City of Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378; *Bradley v. Sattler*, 156 Ill. 603, 41 N. E. 171; *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620. Deceased was a brakeman over 20 years old, whose next of kin was a father, living in Germany. *Held*, that the plaintiff was entitled to more than nominal damages. The court says that while the measure of recovery would be affected by proof, or by the absence of it, of facts showing the value of the life to the survivors, the law presumes some value. *Robel v. Chicago, M. & St. P. Ry. Co.*, 35 Minn. 84, 27 N. W. 305. It is not competent for the defendant to prove that the child's services were of no value. *Foppiano v. Baker*, 3 Mo. App. 560. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-119.

<sup>100</sup> *City of Chicago v. Scholten*, 75 Ill. 468. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-119.

<sup>101</sup> *Louisville, N. A. & C. Ry. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010; *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85, *Corbett v. Oregon Short Line R. Co.*, 25 Utah, 449, 71 Pac. 1065. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-119.

<sup>102</sup> *Potter v. Chicago & N. W. R. Co.*, 22 Wis. 615; *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-119.

<sup>103</sup> The mother was a widow, poor, and kept boarders. Deceased was a boy, an only child, healthy intelligent, and obedient. The physician's bills and funeral expenses were \$290. On the first trial the jury gave \$4,500, which was set aside as excessive. *Little Rock & Ft. S. Ry. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44. On the second trial the jury gave \$3,500, of which the plaintiff remitted \$1,235. *Held*, that a third trial would not be granted on the

*Same—Expectancy of Benefit after Majority*

Damages for the death of an adult child, as will be seen, are usually confined, except where they are based upon the

ground of excessive damages. *Id.*, 39 Ark. 491. Deceased was a son six or seven years old. *Held*, that a verdict of \$2,000 was not so excessive as to justify the court to interfere. *Chicago & A. R. Co. v. Becker*, 84 Ill. 483. Deceased was within 18 months of majority, and fitting herself to be a teacher, at the expense of her father. Her next of kin were her parents and a sister. *Held*, that these facts did not justify a verdict of \$2,000, or more than nominal damages. *Lake Shore & M. S. Ry. Co. v. Sunderland*, 2 Ill. App. 307. Whether the damages were excessive is a question of fact which will not be reviewed in the supreme court. *City of Joliet v. Weston*, 123 Ill. 641, 14 N. E. 665; *Id.*, 22 Ill. App. 225; *City of Salem v. Harvey*, 29 Ill. App. 483; *Id.*, 129 Ill. 344, 21 N. E. 1076. A judgment for \$3,000 for a minor, who was 11 years and 8 months old, intelligent, healthy, and promising, and left surviving him a father, earning \$700 or \$800 a year as an engineer, and having a wife and 3 children, is not grossly excessive. *Union Pac. Ry. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501. Deceased was 18 years old, and was employed at \$1.40 a day. His next of kin were a father and brother. *Held*, that a verdict of \$3,400 was excessive, as it would realize a perpetual income equal to more than three quarters of his annual earnings. *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205. A verdict of \$1,500 for a strong, healthy girl 11 years old, *held* not excessive. *Cooper v. Lake Shore & M. S. Ry. Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482. Deceased was 6 years old, in good health, and of ordinary intelligence and promise. His father and sole heir was working on a salary, and was 40 years old. The jury gave a verdict of \$5,000, which the trial court reduced to \$3,000. *Held*, that it should be set aside as excessive. *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161, 49 N. W. 694. Cf. *O'Malley v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 289, 45 N. W. 441. In *Strutzel v. St. Paul City Ry. Co.*, 47 Minn. 543, 50 N. W. 690, it was *held*, "though not without some hesitancy," that a verdict of \$2,300 for a boy of 6 years old should not be disturbed. A verdict of \$4,000 for a boy of 8 years *held* excessive, and reduced to \$2,000. *City of Vicksburg v. McLain*, 67 Miss. 4, 6 South. 774. A verdict of \$5,000 for a son 18 years old, employed as a brakeman, where there is no evidence of the amount of his earnings, and no aggravating circumstances exist, is excessive. *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286, 6 S. W. 464. A verdict of \$2,250 for a son 18 years old, earning \$50 a month, the expenses of sickness and funeral being \$300, is excessive. *Hickman v. Missouri Pac. Ry. Co.*, 22 Mo. App.

loss of a prospective inheritance, to cases where the child has manifested his willingness to assist his parents by actually doing so. In accordance with the principle of these cases, it is held in Arkansas,<sup>104</sup> Maryland,<sup>105</sup> Michigan,<sup>106</sup> and Pennsyl-

344. A verdict of \$1,846 for death of a boy 15 years old, strong, robust, and attentive to business, and already earning \$4 a week, cannot be held excessive. *Franke v. City of St. Louis*, 110 Mo. 516, 19 S. W. 938. Verdicts of \$936 and \$1,056 for two sons, aged 13 and 15, respectively, *held* excessive. *Talfer v. Northern R. Co.*, 30 N. J. Law, 188. It was in evidence that the son was 14 years old when he was killed; that the average earning capacity of a lad from 14 to 21 years was from 75 to 90 cents a day; and that the expense of his maintenance was from 40 to 60 cents a day. *Held*, that \$1,250 was not excessive damages. *Pennsylvania Coal Co. v. Nee* (Pa.) 13 Atl. 841. A verdict of \$2,500 for a healthy five year old boy, with a fine mind, and well grown, kind, and dutiful, where the parents are poor, does not clearly show that the jury committed some palpable error, or totally mistook the rule of law, or were swayed by passion or prejudice, so as to warrant the court in setting it aside as excessive. *Ross v. Texas & P. Ry. Co.* (C. C.) 44 Fed. 44. Deceased was a boy of eight, and his mother was in poor health, and dependent on friends, and lost by his death a pension of \$2 a month. *Held*, that a verdict of \$2,000 was not excessive. *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613. Deceased was a healthy boy, 16 months old, whose parents were poor and approaching middle life. *Held*, that a verdict of \$1,000 was not excessive. *Hoppe v. Chicago M. & St. P. Ry. Co.*, 61 Wis. 359, 21 N. W. 227. A verdict of \$1,200 for a boy eight years old, whose parents were poor and had a large family, *held* not excessive. *Strong v. City of Stevens Point*, 62 Wis. 255, 22 N. W. 425. Deceased was seven years old. His father was poor, troubled with rheumatism, and sawed wood for a living, and his mother at times worked out. *Held*, that a verdict of \$2,500 was not excessive. *Johnson v. Chicago & N. W. Ry. Co.*, 64 Wis. 425, 25 N. W. 223. A verdict of \$2,000 for a boy 18 months old *held* not excessive. *Schrier v. Milwaukee, L. S. & W. Ry. Co.*, 65 Wis. 457, 27 N. W. 167. See "Death," *Dec. Dig.* (Key No.) § 99; *Cent. Dig.* §§ 125-130.

<sup>104</sup> *Little Rock & Ft. S. Ry. Co. v. Baker*, 33 Ark. 350, 34 Am. Rep. 44; *St. Louis, I. M. & S. Ry. Co. v. Freeman*, 36 Ark. 41. See "Death," *Dec. Dig.* (Key No.) § 87; *Cent. Dig.* § 115.

<sup>105</sup> *State, to use of Coughlan v. Baltimore & O. R. Co.*, 24 Md. 84, 87 Am. Dec. 600; *Agricultural & Mech. Ass'n of Washington v. State*, 71 Md. 86, 18 Atl. 37, 17 Am. St. Rep. 507. See "Death," *Dec. Dig.* (Key No.) § 87; *Cent. Dig.* § 115.

<sup>106</sup> *Cooper v. Lake Shore & M. S. Ry. Co.*, 66 Mich. 261, 33 N.

vania<sup>107</sup> that, in an action for the death of a minor child of tender years, damages are limited to the loss of service during the child's minority, and that the chances of his surviving his parents and of his ability and willingness to assist them after that period should be excluded from consideration. In Maryland<sup>108</sup> the same rule has been held to apply, although the minor is old enough to be self-supporting, and has actually contributed to the support of the parent; and the rule as declared in Pennsylvania would cover such a case.<sup>109</sup> But in Arkansas the rule does not apply where the minor has shown himself able and willing to make his own living, and to contribute to the support of his parents.<sup>110</sup> In New York, Kansas,<sup>111</sup> Texas,<sup>112</sup> and Wisconsin,<sup>113</sup> damages are not limited

W. 306, 11 Am. St. Rep. 482, *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539, 48 N. W. 44. See "Death," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 115.

<sup>107</sup> *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318; *Caldwell v. Brown*, 53 Pa. 453; *Lehigh Iron Co. v. Rupp*, 100 Pa. 95. See "Death," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 115.

<sup>108</sup> No expectation of pecuniary benefit to the father from the continuance of the life, after minority, of a son 19 years old, can be considered, although the son had been emancipated 2 years before his death, and had paid to his father the greater part of his earnings, and had promised to help him after becoming of age. *Agricultural & Mech. Ass'n of Washington v. State*, 71 Md. 86, 18 Atl. 37, 17 Am. St. Rep. 507. See "Death," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 115.

<sup>109</sup> *Lehigh Iron Co. v. Rupp*, 100 Pa. 95. See "Death," *Dec. Dig. (Key No.)* § 87; *Cent. Dig.* § 115.

<sup>110</sup> *St. Louis, I. M. & S. Ry. Co. v. Davis*, 55 Ark. 462, 18 S. W. 628. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>111</sup> *Missouri Pac. Ry. Co. v. Peregoy*, 36 Kan. 424, 14 Pac. 7. But the parent's right of recovery must be based on the expectancy of their lives. *Fidelity Land & Improvement Co. v. Buzzard*, 69 Kan. 330, 76 Pac. 832. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>112</sup> *Gulf, C. & S. F. Ry. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667; *San Antonio St. R. Co. v. Mechler* (Tex. Civ. App.) 29 S. W. 202. See *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>113</sup> *Johnson v. Chicago & N. W. Ry. Co.*, 64 Wis. 425, 25 N. W. 223. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

to the value of the services during minority.<sup>114</sup> In New York<sup>115</sup> the right of action, even in case of the death of an adult child or a collateral relative, is not confined to cases where there is evidence of past benefits upon which to base a reasonable probability of future benefits; and it is accordingly held that in an action for the death of a minor child the jury are not confined to a consideration of the benefits which would have resulted to the parents during minority, but may consider the probable, and even possible, benefits which might have resulted to them from his life, modified by the chances of failure and misfortune. In Wisconsin<sup>116</sup> it is held that the jury may take into consideration the reasonable expectation of pecuniary advantage that would have resulted from the child living beyond minority; but that it must be shown that the circumstances were such as to render it probable that the parents might need the services of the child, or aid from him, after majority; and that a sufficient foundation for such damages is laid by showing that the physical or pecuniary circumstances of the parents were such

<sup>114</sup> *Draper v. Tucker*, 69 Neb. 434, 95 N. W. 1026. See, also, *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 518, 21 N. W. 711, where in an action by the administrator for the death of a child 18 months old, owing to the fact that another action had been (erroneously) begun by the father to recover for the loss of services of the child during minority, only such damages were claimed as would accrue to the father or next of kin by reason of the loss of such pecuniary benefit as he might have received after the minority, a new trial was granted for error in the instructions, but the court intimates that the action might be maintained. See, also, *Cumberland Telephone & Telegraph Co. v. Anderson*, 89 Miss. 732, 41 South. 263. Although the father had given his time to the deceased (a minor son), the parents may recover more than nominal damages. *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461. See "*Death*," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>115</sup> *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108. See "*Death*," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>116</sup> *Potter v. Chicago & N. W. R. Co.*, 23 Wis. 615; *Id.*, 21 Wis. 372, 94 Am. Dec. 548. Cf. *Seaman v. Farmers' Loan & Trust Co.*, 15 Wis. 578. See "*Death*," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.



as to show that they might need such services or aid.<sup>117</sup> In Iowa<sup>118</sup> and Washington<sup>119</sup> two actions may be maintained—one by the personal representative to recover damages to the estate for the loss of benefits that would have accrued after majority, and one by the parent for loss of services during minority.

### **SAME—PROSPECTIVE BENEFITS**

#### **140. Damages may be recovered for loss of prospective benefits which it is reasonably probable plaintiff would have received.**

In addition to the damages for loss of services, support, etc., damages may also be recovered for the loss of prospective benefits which it is reasonably probable the plaintiff would have received from the continuance of the life of the deceased. The cases in which these damages are allowed are very often actions by parents for the death of adult children, or actions for the benefit of adult children for the death of a parent, or for the benefit of brothers and sisters or other collateral relatives. But the application of the rule is by no means confined to cases of this description. It is equally applicable in actions for the benefit of husbands, wives, minor children,<sup>120</sup> and in some jurisdictions, at least, of parents for minor children.

<sup>117</sup> See, also, *Johnson v. Chicago & N. W. Ry. Co.*, 64 Wis. 425, 25 N. W. 223. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>118</sup> *Walters v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 458; *Lawrence v. Birney*, 40 Iowa, 377; *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 71; *Benton v. Chicago, R. I. & P. R. Co.*, 55 Iowa, 496, 8 N. W. 330; *Morris v. Chicago, M. & St. P. R. Co. (C. C.)* 26 Fed. 22; *Code Iowa 1897*, § 3471. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>119</sup> *Hedrick v. Ilwaco Ry. & Nav. Co.*, 4 Wash. 400, 30 Pac. 714; 1 Rem. & Bal. Ann. Codes & St. §§ 183, 184. See "Death," *Dec. Dig. (Key No.)* §§ 87, 95; *Cent. Dig.* §§ 108-115.

<sup>120</sup> *Pym v. Railway Co.*, 2 Best & S. 759, 4 Best & S. 396. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

In order to lay a foundation for the recovery of damages for the loss of prospective benefits, where the action is for the death of an adult child, it is usually held necessary, except in New York, for the plaintiff to show that the deceased, during his life, gave assistance to the beneficiaries, by way of money, services, or other material benefits, which, in reasonable probability, would have continued but for the death.

Thus, in *Dalton v. Railway Co.*,<sup>121</sup> where it appeared that the plaintiff's son, who was 27 years old and unmarried, and lived away from his parents, had in the last 7 or 8 years been in the habit of making them occasional presents of provisions and money, amounting to about £20 a year, it was held that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from his son's life as to entitle him to recover damages.<sup>122</sup> In *Sykes v. Railway Co.*,<sup>123</sup> on the contrary, where the deceased was a bricklayer, and received from his father the wages of a skilled workman, and was of great assistance to his father, who was also a bricklayer, and who, owing to the loss of assistance from the deceased, could not take the contracts which he had done during his son's life, it was held that, inasmuch as the benefit which the father derived accrued, not from the relationship, but from a contract, and there was no evidence that he paid his son less than the usual wages, he had suffered no pecuniary loss from the death. The distinction thus drawn in the English cases has generally prevailed also in the United States.

<sup>121</sup> 4 C. B. (N. S.) 296, 4 Jur. (N. S.) 711, 27 Law J. C. P. 227.

<sup>122</sup> See *Franklin v. Railway Co.*, 3 Hurl. & N. 211, where the father was old and infirm, and the son, who was earning good wages, assisted him in some work, for which he was paid 3s. 6d. per week, and the jury found that the father had a reasonable expectation of benefit from the continuance of the son's life, but a verdict of £75 was held excessive. See, also, *Hetherington v. Railway Co.*, 9 Q. B. Div. 160, where the plaintiff was 59 years old, nearly blind, injured in his leg and hands, and unable to work as formerly. Some 5 or 6 years before the death of his son, when the plaintiff was out of work for six months, the son had assisted the father pecuniarily, but had not done so since. *Held*, that there was evidence of pecuniary injury.

<sup>123</sup> 44 Law J. C. P. 191, 32 Law T. (N. S.) 199, 23 Wkly. Rep. 473.

Thus, in *Fordyce v. McCants*,<sup>124</sup> which was an action for the benefit of the father for the death of his unmarried son, 22 years of age, it was held that the plaintiff could recover only by showing that the son gave the father assistance, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of the son. In *Sieber v. Great Northern Ry. Co.*<sup>125</sup> the son was 28 years old, unmarried, and earning \$60 or \$70 per month. He did not live at home, and had never helped his father or family since attaining his majority, except that he carried \$3,500 insurance on his life in favor of his mother. It was held that a verdict for \$2,500 was not excessive but was supported by the evidence.

In Pennsylvania it is said that the terms "parents" and "children," as used in the act, indicate the family relation in point of fact as the foundation of the right of action, without regard to age, and that if the child was of age and the family relation existed damages may be recovered for the loss of the

<sup>124</sup> 51 Ark. 509, 11 S. W. 694, 4 L. R. A. 296, 14 Am. St. Rep. 69. See, also, *Atchison, T. & S. F. R. Co. v. Brown*, 26 Kan. 443; *Winnt v. International & G. N. Ry. Co.*, 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172. The son lived apart from his parents, but was unmarried. No proof was offered of the parents' financial condition, or that they had ever received any actual pecuniary benefits from him during his lifetime; nor was there any evidence showing a reasonable probability of pecuniary advantage to them from the continuance of the son's life. *Held*, that no more than nominal damages should have been recovered. *Cherokee & P. Coal & Min. Co. v. Limb*, 47 Kan. 469, 28 Pac. 181. To the same effect, *Flaherty v. New York, N. H. & H. R. Co.* (R. I.) 35 Atl. 308. The deceased contributed to the support of his mother and invalid sister, but not of his other brothers and sisters. *Held*, that damages should be allowed only on account of the first two. *Richmond v. Chicago & W. M. Ry. Co.*, 87 Mich. 374, 49 N. W. 621. But see *Johnson v. Missouri Pac. Ry. Co.*, 18 Neb. 690, 26 N. W. 347, where the father lived in Sweden, and had received no aid from the deceased since his coming to the United States, a short time before the death, and it was held that the evidence should have been submitted to the jury. See "Death," *Dec. Dig. (Key No.)* §§ 77, 87, 95; *Cent. Dig.* §§ 96, 108-120.

<sup>125</sup> 76 Minn. 269, 79 N. W. 95. See "Death," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* §§ 125-130.

reasonable expectation of pecuniary advantage, if any, from the continuance of the relation.<sup>126</sup> But if the family relation has ceased, and the child does not contribute to his parent's support, no damages can be recovered.<sup>127</sup>

In determining the compensation for loss of prospective benefits, the proper measure of damages is the present worth of the amount which it is reasonably probable the deceased would have contributed to the support of the beneficiary during the latter's expectancy of life, in proportion to the amount he was contributing at the time of his death, not exceeding his expectancy of life,<sup>128</sup> though it would seem that the rule is

<sup>126</sup> *Pennsylvania R. Co. v. Adams*, 55 Pa. 499; *Pennsylvania R. Co. v. Keller*, 67 Pa. 300; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>127</sup> *Lehigh Iron Co. v. Rupp*, 100 Pa. 95. To the same effect, *Flaherty v. New York N. H. & H. R. Co. (R. I.)* 35 Atl. 308. See, generally, *Colorado Coal & Iron Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Dural v. Hunt*, 34 Fla. 85, 15 South. 876. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>128</sup> *Richmond v. Chicago & W. M. Ry. Co.*, 87 Mich. 374, 49 N. W. 621; *Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 192, 40 South. 280; *Cumberland Telephone & Telegraph Co. v. Anderson*, 89 Miss. 732, 41 South. 263; *McCabe v. Narragansett Electric Lighting Co.*, 26 R. I. 427, 59 Atl. 112; *Rudiger v. Chicago, St. P. M. & O. R. Co.*, 101 Wis. 292, 77 N. W. 169; *Coley v. City of Statesville*, 121 N. C. 301, 28 S. E. 482; *Louisville & N. R. Co. v. Jones*, 130 Ala. 456, 30 South. 586; *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519, 21 South. 507, 62 Am. St. Rep. 121; *McKAY v. NEW ENGLAND DREDGING CO.*, 92 Me. 454, 43 Atl. 29, *Cooley, Cas. Damages*, 254. And see, generally, *Graham v. Consolidated Traction Co.*, 64 N. J. Law, 10, 44 Atl. 964; *Galveston H. & S. A. Ry. Co. v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264.

In *Kansas* plaintiff's right to recover for expected benefits is limited to his expectancy. *Fidelity Land & Improvement Co. v. Buzzard*, 69 Kan. 330, 76 Pac. 832. And see *Rouse v. Detroit Electric Ry.*, 128 Mich. 149, 87 N. W. 68. In *Virginia*, in an action for the benefit of a widowed mother for the death of an unmarried son, who lived with and cared for her, it was held that the jury might allow such sum as would be equal to his probable earnings during his and her expectancy of life. *Baltimore & O. R. Co. v. Noell's Adm'r*, 32 Grat. (Va.) 394. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

not to be applied with mathematical strictness,<sup>129</sup> and that the jury may properly take into consideration circumstances affecting the ability of the deceased to continue his contributions, had he lived,<sup>130</sup> and, in the case of parents and children, the increasing wants of the parent and the increasing ability of the child to supply them.<sup>131</sup> In *Hutchins v. St. Paul, M. & M. Ry. Co.*,<sup>132</sup> it was said: "The proper estimate can usually be arrived at with approximate accuracy by taking into account the calling of the deceased, and the income derived therefrom; his health, age, talents, habits of industry; his success in life in the past, as well as the amount of aid in money or services which he was accustomed to furnish the next of kin; and, if the verdict is greatly in excess of the sum thus arrived at, the court will set it aside or cut it down."<sup>133</sup> The applica-

<sup>129</sup> *Ruppel v. United Railroads of San Francisco*, 1 Cal. App. 666, 82 Pac. 1073. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>130</sup> *Ruppel v. United Railroads of San Francisco*, 1 Cal. App. 666, 82 Pac. 1073; *New York, C. & St. L. Ry. Co. v. Roe*, 25 Ohio Cir. Ct. R. 628; *Beecher v. Long Island R. Co.*, 53 App. Div. 324, 65 N. Y. Supp. 642. See, also, ante, p. 441. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>131</sup> *International & G. N. R. Co. v. Kindred*, 57 Tex. 491; *Texas & P. Ry. Co. v. Lester*, 75 Tex. 56, 12 S. W. 955. See *Hetherington v. Railway Co.*, 9 Q. B. Div. 160. It is error to instruct the jury as to the disposition of the child to help, since the question is, did he help? *Chicago & N. W. Ry. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>132</sup> 44 Minn. 5, 46 N. W. 79. In that case the verdict was \$3,500, while the evidence showed that the contributions of the son to his mother did not exceed \$50 a year, and that her expectancy of life was only 7½ years. The court reduced the verdict to \$2,000. *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>133</sup> The jury may consider the circumstances of the son, his occupation, age, health, habits of industry, sobriety, and economy, his annual earnings, and his probable duration of life at the time of the accident; also the amount of property, age, health, and probable duration of plaintiff's life, and the amount of assistance he had a reasonable expectation of receiving from the son. *Hall v. Galveston, H. & S. A. R. Co. (C. C.)* 39 Fed. 18. Though the true measure of damages for the killing of plaintiff's son is

tion of the rules particularly with reference to the amount of the verdict, is illustrated in the cases in the subjoined note.<sup>134</sup>

"a sum equal to the pecuniary benefit the parent had a reasonable expectation of receiving from her child had he not died," it is not misleading to charge that the damages are "such sum as you may, under the evidence, reasonably believe plaintiff might have received from the assistance of deceased had he not been killed; and you may, in estimating such sum, if any, consider, under the evidence before you, the age of deceased, the time he might have lived, the age of the plaintiff, the time she may probably live, and any other evidence tending to show what damages, if any, she may have suffered by the killing of deceased. You will find for plaintiff such damages, under the instructions heretofore given, as you may think will compensate her for the loss, if any, she may have sustained by the killing." *Missouri Pac. Ry. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857. See "*Death*," *Dec. Dig.* (Key No.) §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>134</sup>An assessment of damages at \$5,000, in an action for wrongful death, where the evidence showed that deceased was a bright active boy, 16 years of age, who for nearly 3 years had been a general clerk in a grocery store, is not excessive, though this is by statute the extreme limit of recovery in such an action. *Nelson v. Branford Lighting & Water Co.*, 75 Conn. 548, 54 Atl. 303. A verdict of \$5,000 is not excessive, where it appears that the deceased at the time of his death was about 18 years of age, was proficient in the English language, had attended night schools, and was "a very good boy," and left him surviving a brother 8 years of age, and a sister, aged 22, who lived with his mother, to whom he gave all his earnings. *Chicago Terminal Transfer R. Co. v. O'Donnell*, 114 Ill. App. 345, judgment affirmed 213 Ill. 545, 72 N. E. 1133. In an action by a mother for the death of her son, who was 12 years old, and at the time of his death earning a salary of \$20 a month, a verdict of \$3,500 is not so excessive as to authorize setting it aside as having been rendered under the influence of passion or prejudice. *Lee v. Publishers: George Knapp & Co.*, 155 Mo. 610, 56 S. W. 458. Deceased contributed to the support of his mother and her invalid daughter \$30 to \$50 a month, and gave his sister \$5 to \$20 a month when necessary. He was healthy, and his expectancy of life was 32½ years. His mother was 59 years old, and her expectancy was 14¾ years. His sister was 19 years old, and her expectancy was 43 years. He earned \$100 to \$150 a month. *Held*, that a verdict for \$6,500 was not excessive; and that the jury were at liberty to consider that, in aiding the daughter, who belonged to his mother's family, the son was contributing to the support of his mother, who was his next of kin. *Little Rock & F. S. Ry. Co. v. Voss*

*Death of Parent of Adult Child*

Although the benefit of the action, unless, as in Missouri, the statute otherwise provides, is not confined to minor chil-

(Ark.) 18 S. W. 172. Deceased first received \$25 and afterwards \$35 per month and board; his services were constantly increasing in value; his living expenses were about \$125 a year, and the balance of his wages was sent to his parents. His father was poor, and dependent on his relatives for support, and his expectancy of life was about 17 years. *Held*, that a judgment of \$2,391.50 was not excessive. *Fordyce v. McCants*, 55 Ark. 384, 18 S. W. 371. When deceased was 23 years old, of good habits, and the sole support of his mother and her minor children, to whom he gave from \$40 to \$50 per month, a verdict for \$3,000 is not excessive. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269. The father was 50 years old, and had little property besides his homestead. When not on the road the son lived with him and contributed to the support of the family. There was a policy of insurance on the life of the father for the benefit of the mother, upon which the son paid the premium, and he had promised to keep it paid. *Held*, that a verdict for \$2,000 was not excessive. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338. In a suit for negligently causing the death of a 16 year old son, who resided with his father, and, being on the eve of graduation, was in position to greatly aid him in his business, a verdict for \$7,500 will not be disturbed as excessive. *Morris v. Metropolitan St. Ry. Co.*, 63 App. Div. 78, 71 N. Y. Supp. 321, affirmed in 170 N. Y. 592, 63 N. E. 1119. Where deceased was a boy of 15 years, employed as a farm laborer, with an earning capacity of not more than \$20 a month, and the measure of damages for his death was the pecuniary benefit which would have resulted to the father during the minority of the son, had he lived until his majority, a verdict of \$3,000 should be reduced to \$1,500. *May v. West Jersey & S. R. Co.*, 62 N. J. Law, 67, 42 Atl. 165. Where plaintiff's intestate, a girl 8 years of age, exceptionally bright for her years, was killed in an accident by reason of a defective county bridge, a verdict against the county for \$3,500, which the court reduced to \$2,500, was not excessive. *Eginoire v. Union County*, 112 Iowa, 558, 84 N. W. 758. Deceased left, surviving her, a father, mother, two brothers, and a sister. She lived with her father, mother, and sister, and had contributed to the support of her family as well as she could, and was under an engagement to teach school. *Held*, that a verdict of \$1,500 was not excessive. *City of Salem v. Harvey*, 29 Ill. App. 483, affirmed 129 Ill. 344, 21 N. E. 1076. Deceased was industrious and economical, and, at the age of 26 years, earning \$1,000 a year, out of which he was

dren,<sup>185</sup> cases in which the facts warrant a recovery of damages by adult children for the loss of pecuniary benefits in the nature of prospective gifts are rare. The recovery must, usually, be based upon evidence of pecuniary benefits conferred by the deceased during his life, the continuance of which might reasonably have been expected.<sup>186</sup> But in New

furnishing plaintiff, his mother, then 51 years old, \$200 per annum. *Held*, that a verdict of \$4,200 would not be disturbed. *Texas & P. Ry. Co. v. Lester*, 75 Tex. 56, 12 S. W. 955. Where a mother who is 60 years old, and in good health, had for many years been supported by her son, aged 22½ years, and who at the time of his death was earning from \$60 to \$65 per month, one-half of which he had been in the habit of giving to his mother, a verdict for \$3,550 is not excessive. *Missouri Pac. Ry. Co. v. Henry*, 75 Tex. 220, 12 S. W. 828. A verdict for \$4,995 was not so excessive as to justify reversal, where decedent, at the time of his death, was a strong, healthy man 28 years old, of good habits, and earning \$1.75 per day. *Webb v. Denver & R. G. W. Ry. Co.*, 7 Utah, 363, 26 Pac. 981. Where the evidence showed that the earnings of the adult son were not to exceed \$2 per day when at work, but that he did not have steady work, that his living expenses were \$20 per month, and that his contributions were small, a verdict of \$3,000 was excessive. *McKAY v. NEW ENGLAND DREDGING CO.*, 92 Me. 454, 32 Atl. 29, Cooley, Cas. Damages, 254. In an action by an administrator to recover damages for negligently causing the death of his decedent, an ordinarily bright boy, four years and four months of age, a verdict for \$6,000 is excessive, and should only be allowed to stand to the extent of \$3,000. *Hively v. Webster County*, 117 Iowa, 672, 91 N. W. 1041. In an action by a parent for the death of a child, where the evidence showed that the boy was 14 years of age, was earning 75 cents per day, while an older brother and his father, who were in the same employment, earned 85 cents to \$1.25, and \$1.75, respectively, and that it cost the entire 75 cents to take care of the boy who was killed, a verdict for \$7,487 was excessive, and the judgment thereon would be reduced to \$2,500 as a condition of its affirmance. *McDonald v. Champion Iron & Steel Co.*, 140 Mich. 401, 103 N. W. 829. See "*Death*," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>185</sup> *Baltimore & O. R. Co. v. State*, to use of *Hauer*, 60 Md. 449. See "*Death*," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>186</sup> In an action for the benefit of two sons and a daughter, all married and of age, it appeared that the deceased lived with her daughter, thus enabling the latter to work and earn six dollars



York it has been held, in an action where the deceased was a woman 53 years old and the beneficiaries her two children, a son 25 years old and a daughter 22 years old, both of whom were earning their own support, that the jury might consider prospective or indefinite damages which might arise under the circumstances; that they might consider whether, if the health of the daughter or son should fail, the mother might not have taken her or him to her own home to be cared for indefinitely.<sup>127</sup> Nothing can be allowed for the loss of a father's counsel and services, except so far as they can be estimated in money.<sup>128</sup>

a week, and that the deceased also frequently assisted in nursing the sick in her sons' families; but it did not appear how often she went, how long she stayed, or what was the value of such services. *Held* (1) that, as the services rendered by the mother constituted the pecuniary benefit which the daughter had a right to expect from the continuance of the life, the value of such services, and not what the daughter might earn, was the measure of damages; (2) that there was no evidence sufficient to warrant the jury in finding any pecuniary loss to the sons. *Baltimore & O. R. Co. v. State, to Use of Mahone*, 63 Md. 135. The deceased lived with one married daughter, and was in the habit of rendering services (the value of which did not appear) to her and to her husband, who was an invalid, and to her other adult children. *Held*, that a nonsuit was properly denied. *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303, 7 S. E. 515. The court lays stress on the absence of the word "pecuniary" from the statute. A married daughter and son, nearly 21 years old, neither of them supported by their father, who left also a widow and dependent minor children, have no right to damages. *St. Louis, A. & T. Ry. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104. The injury to the sons of deceased by the dissolution of a partnership between him and them cannot be considered. *DEMAREST v. LITTLE*, 47 N. J. Law, 28, Cooley, Cas. Damages, 258. See "*Death*," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>127</sup> *Countryman v. Fonda, J. & G. R. Co.*, 166 N. Y. 201, 59 N. E. 822, 82 Am. St. Rep. 640, reversing 33 App. Div. 636, 54 N. Y. Supp. 1098. See "*Death*," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>128</sup> *DEMAREST v. LITTLE*, 49 N. J. Law, 28, Cooley, Cas. Damages, 258. See "*Death*," *Dec. Dig. (Key No.)* § 86; *Cent. Dig.* §§ 108-120.

*Death of Collateral Relative*

The same rules apply to the recovery of damages for the death of collateral relatives.<sup>139</sup>

**SAME—PROSPECTIVE INHERITANCE****141. Damages are recoverable for the loss of prospective accumulations of property which it is reasonably probable plaintiff would have inherited.**

Where it is probable that the decedent, but for his death, would have accumulated property, which, if he died intestate, would have been inherited by the beneficiaries of the action, this constitutes a reasonable expectation of pecuniary benefit, which will authorize a recovery of damages for its loss.<sup>140</sup>

<sup>139</sup> Where decedent was addicted to the use of intoxicating liquors, was careless in his work, and did not save his earnings, his brothers and sisters, to whose support he had never contributed, were entitled to nominal damages only. *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, 52 N. W. 840. But see *Grottenkemper v. Harris*, 25 Ohio St. 510. Deceased had a sister and two brothers living in Denmark. He was a bridge carpenter, and received \$2 a day. He had been at work three or four months, and had sent some money to his sister (how much did not appear). There was no evidence as to his age or his capacity for earning and saving money, or as to the expectation of pecuniary benefit to be derived by the next of kin from his estate if he had lived longer. *Held*, that a verdict of \$1,750 should be set aside as excessive. *Serensen v. Northern Pac. R. Co.* (C. C.) 45 Fed. 407. Damages to minor sisters and nieces. *Duval v. Hunt*, 34 Fla. 85, 15 South. 876. Where plaintiff's intestate, who was killed in a collision with defendant's train, was a single woman, who kept house for her three brothers and a sister, receiving as compensation her board, clothing, etc., and a share in the savings of the family, a verdict for \$5,000 was excessive, as the damages in such cases are limited by statute to the pecuniary loss sustained by the next of kin. *Rafferty v. Erie R. Co.*, 66 N. J. Law, 444, 49 Atl. 456. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95, 99; *Cent. Dig.* §§ 108-120.

<sup>140</sup> *FLORIDA CENT. & P. R. CO. v. FOXWORTH*, 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149, *Cooley, Cas. Damages*, 242; *Florida Cent. & P. R. Co. v. Sullivan*, 120 Fed. 799, 57 C. C. A.

So, too, it has been held that the loss of the chance to be endowed out of her husband's accumulations is a pecuniary injury to the wife.<sup>141</sup>

In determining the probable accumulations, the estimate must be confined to the accumulations from the labor of the deceased in his trade or business,<sup>142</sup> and profits on investments cannot be considered,<sup>143</sup> and due regard must be given to the decedent's age, capacity for earning money, his prospective activity, etc.<sup>144</sup>

167, 61 L. R. A. 410; *Sternfels v. Metropolitan St. Ry. Co.*, 73 App. Div. 494, 77 N. Y. Supp. 309, affirmed in 174 N. Y. 512, 66 N. E. 1117; *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Castello v. Landwehr*, 28 Wis. 522; *Lawson v. Chicago, St. P., M. & O. Ry. Co.*, 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634; *Rudiger v. Chicago, St. P. M. & O. R. Co.*, 101 Wis. 292, 77 N. W. 169; *DENVER & R. G. R. CO. v. SPENCER*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121, Cooley, Cas. Damages, 261; *Bauer v. Richter*, 103 Wis. 412, 79 N. W. 404. And see *DEMAREST v. LITTLE*, 47 N. J. Law, 28, Cooley, Cas. Damages, 258; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. Ed. 591; *Pym v. Railway Co.*, 2 Best & S. 759, 4 Best & S. 396. Contra, see *Wiest v. Electric Traction Co.*, 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666; *Baltimore & P. R. R. Co. v. Golway*, 6 App. D. C. 143. In Alabama the holdings are discordant. Compare *McAdory v. Louisville & N. R. Co.*, 94 Ala. 272, 10 South. 507, and *Tutwiler Coal, Coke & Iron Co. v. Enslen*, 129 Ala. 336, 30 South. 600. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>141</sup> *Catawissa R. Co. v. Armstrong*, 52 Pa. 282; *FLORIDA CENT. & P. R. CO. v. FOXWORTH*, 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149, Cooley, Cas. Damages, 242. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>142</sup> *DEMAREST v. LITTLE*, 47 N. J. Law, 28, Cooley, Cas. Damages, 258. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>143</sup> *Sternfels v. Metropolitan St. Ry. Co.*, 73 App. Div. 494, 77 N. Y. Supp. 309, affirmed in 174 N. Y. 512, 66 N. E. 1117; *DEMAREST v. LITTLE*, 47 N. J. Law, 28, Cooley, Cas. Damages, 258. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>144</sup> *Sternfels v. Metropolitan St. Ry. Co.*, 73 App. Div. 494, 77 N. Y. Supp. 309, affirmed in 174 N. Y. 512, 66 N. E. 1117; *DENVER & R. G. R. CO. v. SPENCER*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121, Cooley, Cas. Damages, 261; *DEMAREST v. LITTLE*, 47 N. J. Law, 28, Cooley, Cas. Damages, 258. See "Death," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

It would seem that, where there is no evidence tending to show that the deceased would probably have accumulated anything if he had lived, no more than nominal damages should be awarded,<sup>145</sup> and that the verdict should be set aside if the amount is grossly out of proportion to the reasonable probabilities of the case.<sup>146</sup>

<sup>145</sup> In an action for the benefit of brothers and sisters, where the deceased had accumulated nothing, *held*, that only nominal damages should be awarded. *Howard v. Delaware & H. Co.* (C. C.) 40 Fed. 195, 6 L. R. A. 75. But in *Grotenkemper v. Harris*, 25 Ohio St. 510, where the deceased was only four or five years old, and the beneficiaries were a brother and sisters, it was *held* not to be error to charge that the reasonable expectation of pecuniary benefit may consist of what a person may give to his next of kin while living, as well as what they may inherit from him at his death. See "*Death*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 97.

<sup>146</sup> *DENVER & R. G. R. CO. v. SPENCER*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121, *Cooley, Cas. Damages*, 261. Where deceased was 65 years of age, with an expectancy of 10 or 11 years, and plaintiff, his wife, was 64 years of age, it appeared that the joint earnings of deceased and his son, who assisted him in running the farm, amounted to only \$800 per year, it was held that a verdict for \$4,000 was excessive, in the absence of proof as to expenses or the amount that went to the support of deceased, as there was nothing on which to base an estimate of prospective accumulations. *Rudiger v. Chicago, St. P., M. & O. Ry. Co.*, 101 Wis. 292, 77 N. W. 169. The injury claimed was the deprivation of the probable accumulations of deceased in his business. The jury gave a verdict of \$27,500. To reach this result, they must have found that deceased, who had already acquired a competence, would have continued in business for his full expectancy of life; would have retained sufficient health and vigor of mind to enable him to do so as successfully as before; would have avoided business losses; would have safely invested his accumulations; and that the children would have received them at his death. *Held*, that the verdict should be set aside, unless the plaintiff would consent to a reduction to \$15,000. *DEMAREST v. LITTLE*, 47 N. J. Law, 28, *Cooley, Cas. Damages*, 258. In an action by a widow for the death of her husband, where it appeared that plaintiff was 20 years old and her husband 22 at the time of his death, and that his wages up to that time had been entirely consumed in the expenses of his household, it was error to charge that, if the jury believed the widow's expectancy of life was greater than her husband's, they should allow her the pres-

### EVIDENCE OF PECUNIARY CONDITION OF BENEFICIARIES

142. Evidence of the pecuniary condition of the beneficiaries is, in most jurisdictions, inadmissible, except

**EXCEPTION—(a)** In some cases such evidence is admissible to show the probability of future gifts being made.

**(b)** In Wisconsin and New York such evidence is admissible in all cases.

As a general rule, it is inadmissible to introduce evidence of the poverty<sup>147</sup> or bad health<sup>148</sup> or of other facts tending to

ent value of any property she would probably have received from her husband as dower if he had not been killed, as the realization of any sum as dower depended on too many remote contingencies. *St. Louis, I. M. & S. R. Co. v. Needham*, 3 C. C. A. 129, 52 Fed. 371. Decedent was a widow 61 years old, who had done a profitable business as a boardinghouse keeper, and had made some money, besides supporting a daughter, and occasionally gave small amounts to a son. *Held* that, as the jury were authorized to take into consideration the reasonable expectation of her property being increased for the benefit of her children, who were of age, and the reasonable expectation of pecuniary benefit to them by support or otherwise, a verdict of \$1,000 was sustained by the evidence. *Tuteur v. Chicago & N. W. Ry. Co.*, 77 Wis. 505, 46 N. W. 897. Decedent was a widower, 73 years old, strong and vigorous, and actively engaged in business. The children were of age, and not dependent on him. *Held*, that \$1,000 was not excessive. *City of Wabash v. Carver*, 129 Ind. 552, 29 N. E. 25, 13 L. R. A. 851. See "Death," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* §§ 125-130; "New Trial," *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig.* §§ 151-161.

<sup>147</sup> *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577; *Pittsburgh, C. C. & St. L. Ry. Co. v. Kinnare*, 105 Ill. App. 566, affirmed 203 Ill. 388, 67 N. E. 826; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Chicago & N. W. Ry. Co. v. Howard*, 6 Ill. App. 569; *Heyer v. Salsbury*, 7 Ill. App. 93; *Illinois Cent. R. Co. v. Slater*, 28 Ill. App. 73, affirmed 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. Rep. 242; *City of Delphi v. Lowery*, 74 Ind. 520, 39

<sup>148</sup> See note 148 on following page.

show the necessities of the beneficiaries, since such facts do not tend to prove that they have suffered a pecuniary loss. "If the moral obligation to support near relatives," says Cooley, C. J., in *Chicago & N. W. Ry. Co. v. Bayfield*,<sup>149</sup> "were to be the criterion, we might take their poverty into account; \* \* \* but as this may or may not have been recognized, and, if recognized, may have been very imperfectly responded to, it is manifest that it can be no measure of the pecuniary injury the family received, or was likely to receive, from the death." But an exception to this rule is recognized in some cases where damages are based upon the loss of prospective gifts, and especially in cases for the benefit of parents on account of the death of minor children, as tending to show the probability that such gifts would have been made.<sup>150</sup> In Wis-

Am. Rep. 98; *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500; *Central R. R. v. Rouse*, 77 Ga. 393, 3 S. E. 307; *Central R. R. v. Moore*, 61 Ga. 151. The Illinois cases on this subject are somewhat modified by the recent case of *Pennsylvania Co. v. Keane*, 143 Ill. 172, 32 N. E. 260, in which it was held that, in an action by the widow as administratrix, it is proper to allow her to testify that the deceased was at the time of her death her sole support. The opinion says: "We take it that the rule deducible from the cases is substantially this: that it is not competent to show what the pecuniary circumstances of the widow, family, or next of kin are or have been since the decease of the intestate, but that it is competent to show that the wife, children, or next of kin were dependent upon him for support before and at the time of his death." See "*Death*," *Dec. Dig. (Key No.)* § 72; *Cent. Dig.* §§ 91, 114.

<sup>149</sup> *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Pittsburgh, C., C. & St. L. Ry. Co. v. Kinnare*, 105 Ill. App. 566, affirmed 203 Ill. 388, 67 N. E. 826; *Benton v. C., R. I. & P. R. Co.*, 55 Iowa, 496, 8 N. W. 330. See "*Death*," *Dec. Dig. (Key No.)* § 72; *Cent. Dig.* §§ 91, 114.

<sup>150</sup> 37 Mich. 205. See "*Death*," *Dec. Dig. (Key No.)* § 72; *Cent. Dig.* §§ 91, 114.

<sup>151</sup> *United States Electric Lighting Co. v. Sullivan*, 22 App. D. C. 115; *Pittsburgh, C., C. & St. L. Ry. Co. v. Kinnare*, 105 Ill. App. 566, affirmed in 203 Ill. 388, 67 N. E. 826; *Potter v. Chicago & N. W. Ry. Co.*, 21 Wis. 373, 94 Am. Dec. 548; *Id.*, 22 Wis. 615; *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613; *Johnson v. Chicago & N. W. Ry. Co.*, 64 Wis. 425, 25 N. W. 323; *Wiltse v. Town of Tilden*, 77 Wis. 152, 46 N. W. 234; *Staal v. Grand Rapids & I.*

consin<sup>151</sup> and New York<sup>152</sup> such evidence seems to be admissible in all cases.

### EXPECTATION OF LIFE—LIFE TABLES

#### 143. Standard life tables are admissible to show the expectation of life of the deceased and the beneficiaries, but they are not conclusive.

In order to show the expectation of life of the deceased and of the beneficiaries the Carlisle, Northampton, and other standard life tables may be introduced,<sup>153</sup> though such tables

R. Co., 57 Mich. 239, 23 N. W. 795; Cincinnati St. Ry. Co. v. Altemeier, 60 Ohio St. 10, 53 N. E. 300; Citizens' Ry. Co. v. Washington, 24 Tex. Civ. App. 422, 58 S. W. 1042; Cooper v. Lake Shore & M. S. Ry. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482; Missouri Pac. Ry. Co. v. Perego, 36 Kan. 424, 14 Pac. 7; Little Rock, M. R. & T. Ry. Co. v. Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230; International & G. N. R. Co. v. Kindred, 57 Tex. 491; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Chicago, City of v. McCulloch, 10 Ill. App. 459; Illinois Cent. R. Co. v. Slater, 28 Ill. App. 73, contra. See City of Chicago v. Powers, 42 Ill. 169, 86 Am. Dec. 418; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624. See "Death," *Dec. Dig. (Key No.)* § 72; *Cent. Dig.* §§ 91, 114.

<sup>151</sup> *Annas v. Milwaukee & N. R. Co.*, 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848; *McKeigue v. City of Janesville*, 68 Wis. 50, 31 N. W. 298; *Thompson v. Johnston Bros. Co.*, 86 Wis. 576, 57 N. W. 298; *Thoresen v. La Crosse City Ry. Co.*, 94 Wis. 129, 68 N. W. 548. See "Death," *Dec. Dig. (Key No.)* § 72; *Cent. Dig.* §§ 91, 114.

<sup>152</sup> *Fowler v. Buffalo Furnace Co.*, 41 App. Div. 84, 58 N. Y. Supp. 223; *Erwin v. Neversink Steamboat Co.*, 23 Hun (N. Y.) 577; *Waldele v. New York Cent. & H. R. R. Co.*, 29 Hun (N. Y.) 35; *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y. 526; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 508, 18 N. E. 110. See "Death," *Dec. Dig. (Key No.)* § 72; *Cent. Dig.* §§ 91, 114.

<sup>153</sup> *Knott v. Peterson*, 125 Iowa, 404, 101 N. W. 173; *Philip v. Heraty*, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186; *Haines v. Pearson*, 100 Mo. App. 551, 75 S. W. 194; *Norfolk & W. R. Co. v. Spencer's Adm'x.*, 104 Va. 657, 52 S. E. 310; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280, 87 Am. Dec. 391; *Coates v. Burlington, C. R. & N. Ry. Co.*, 62 Iowa, 486, 17 N. W. 760; *Worden v. Humeston & S. Ry. Co.*, 76 Iowa, 310, 41 N. W. 26; *Gorman*

are not conclusive, since the jury should consider them with the other evidence in the case,<sup>154</sup> and may determine the probable length of life solely upon evidence of the age, health, habits, etc., of the person.<sup>155</sup> The computation should be made from the death of the deceased;<sup>156</sup> and where, as in Iowa,

*v. Minneapolis & St. L. Ry. Co.*, 78 Iowa, 509, 43 N. W. 303; *Louisville, C. & L. R. Co. v. Mahony's Adm'x*, 7 Bush. (Ky.) 235; *Cooper v. Lake Shore & M. S. Ry. Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500; *Sellars v. Foster*, 27 Neb. 118, 42 N. W. 907; *Sauter v. New York Cent. & H. R. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18; *Mississippi & T. R. Co. v. Ayres*, 16 Lea (Tenn.) 725; *San Antonio & A. P. Ry. Co. v. Bennett*, 76 Tex. 151, 13 S. W. 319. See "*Death*," *Dec. Dig. (Key No.)* § 65; *Cent. Dig.* § 84; "*Evidence*," *Dec. Dig. (Key No.)* § 364; *Cent. Dig.* § 1520.

<sup>154</sup> *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 518, 21 N. W. 711; *Farrell v. Chicago R. I. & P. R. Co.*, 123 Iowa, 690, 99 N. W. 578; *McKeigue v. City of Janesville*, 68 Wis. 50, 31 N. W. 298; *Georgia R. & Banking Co. v. Oaks*, 52 Ga. 410; *Georgia R. R. v. Pittman*, 73 Ga. 325; *Central R. R. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Central R. R. v. Thompson*, 76 Ga. 770. Where mortality tables are introduced, and no other evidence is offered to show that the probability of life was greater or less than that shown by such tables, it was error to charge that the tables were not controlling, but should be given just such weight as the jury thought proper. *Nelson v. Lake Shore & M. S. Ry. Co.*, 104 Mich. 582, 62 N. W. 993. See "*Death*," *Dec. Dig. (Key No.)* § 65; *Cent. Dig.* § 84; "*Evidence*," *Dec. Dig. (Key No.)* § 364; *Cent. Dig.* § 1520.

<sup>155</sup> *Beems v. Chicago, R. I. & P. Ry. Co.*, 67 Iowa, 435, 25 N. W. 693; *Deisen v. Chicago, St. P., M. & O. Ry. Co.*, 43 Minn. 454, 45 N. W. 864; *Gulf, C. & F. Ry. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667. And see *The Saginaw (D. C.)* 139 Fed. 906; *Norfolk & W. R. Co. v. Phillip's Adm'x*, 100 Va. 362, 41 S. E. 726. Where the court erroneously gives positive directions for ascertaining the damages by certain mathematical calculations, the error is not cured by the subsequent statement that in the end the whole matter of damages is left entirely to the sound judgment of the jury as to what is proper under all the circumstances. *St. Louis, I. M. & S. R. Co. v. Needham*, 3 C. C. A. 129, 52 Fed. 371. See "*Death*," *Dec. Dig. (Key No.)* § 65; *Cent. Dig.* § 84; "*Evidence*," *Dec. Dig. (Key No.)* § 364; *Cent. Dig.* § 1520.

<sup>156</sup> Plaintiff's intestate being only five years old at the time of his death, it was error to admit in evidence tables giving no expectancy of life for any age under ten years. *Rajnowski v. De-*



the action is brought for the death of a minor to recover damages for the loss of benefits that would have accrued to the estate after his majority, it is error to compute the expectation from the age of 21.<sup>157</sup> The calculation of the amount of pecuniary loss should be based upon the joint lives of the deceased and of the beneficiary.<sup>158</sup>

### INTEREST AS DAMAGES

#### 144. Interest as damages may be recovered.

The jury may take into account the time which has elapsed since the death, as affecting the amount of damages, and it is proper for them, after computing the amount of damages, to add interest upon that sum.<sup>159</sup> The New York act provides that the amount recovered shall draw interest from the death, which interest shall be added to the verdict, and inserted in the entry of judgment. This provision is not unconstitutional.<sup>160</sup> The rate of interest is governed by the statute regulating interest in force at the time of the verdict.<sup>161</sup> The interest is to be added and inserted by the clerk.<sup>162</sup>

troit, B. C. & A. R. Co., 74 Mich. 15, 20, 41 N. W. 847, 849. See "Death," *Dec. Dig. (Key No.)* § 65; *Cent. Dig.* § 84; "Evidence," *Dec. Dig. (Key No.)* § 364; *Cent. Dig.* § 1520.

<sup>157</sup> Walters v. Chicago, R. I. & P. R. Co., 41 Iowa, 71; Wheelan v. Chicago, M. & St. P. Ry. Co., 85 Iowa, 167, 52 N. W. 119. See "Death," *Dec. Dig. (Key No.)* § 65; *Cent. Dig.* § 84; "Evidence," *Dec. Dig. (Key No.)* § 364; *Cent. Dig.* § 1520.

<sup>158</sup> Rowley v. Railway Co., L. R. 8 Exch. 221, 42 Law J. Exch. 153, 29 Law T. (N. S.) 180; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291. See "Death," *Dec. Dig. (Key No.)* § 65; *Cent. Dig.* § 84; "Evidence," *Dec. Dig. (Key No.)* § 364; *Cent. Dig.* § 1520.

<sup>159</sup> St. Louis, I. M. & S. R. Co. v. Cleere, 76 Ark. 377, 88 S. W. 995; Central R. R. v. Sears, 66 Ga. 499. See "Death," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* § 102.

<sup>160</sup> Cornwall v. Mills, 44 N. Y. Super. Ct. 45. See "Death," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* § 102.

<sup>161</sup> Salter v. Utica & B. R. Co., 86 N. Y. 401; *Id.*, 23 Hun (N. Y.) 533, overruling Erwin v. Neversink Steamboat Co., 23 Hun (N. Y.) 578. See "Death," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* § 102.

<sup>162</sup> See Manning v. Port Henry Iron Ore Co. of Lake Champlain,

## REDUCTION OF DAMAGES

**145. Property received by descent or otherwise upon the death of the deceased cannot be considered in reduction of damages.**

Where the beneficiary acquires property by descent or otherwise upon the death of the deceased, it is not proper for the jury to reduce the damages on that account;<sup>163</sup> for it may fairly be assumed that the beneficiary would, in the natural course of events, have acquired the property ultimately, and his damages are for the loss of benefits which he might have received during the remainder of the life of the deceased, or of the accumulations which the deceased might have added to his estate, and which the beneficiary would have acquired, in addition to the estate existing at the time of the premature death. Thus, in *Terry v. Jewett*,<sup>164</sup> it was held that it was not error to refuse to charge the jury that they might take into consideration that the plaintiff would be entitled to the property of the deceased as next of kin. A distinction was suggested in *Grand Trunk Ry. Co. of Canada v. Jennings*,<sup>165</sup> by Lord Watson, who said: "Money provisions made by a husband for the maintenance of a widow, in whatever form, are matters

91 N. Y. 665, reversing 27 Hun (N. Y.) 219. An extra allowance should be computed on the sum awarded by the jury plus the interest inserted in the entry of judgment. *Boyd v. New York, C. & H. R. R. Co.*, 6 Civ. Proc. R. (N. Y.) 222; 1 How. Prac. (N. S. N. Y.) 1. Contra, *Sinne v. City of New York*, 8 Civ. Proc. R. (N. Y.) 252, note. See "Death," *Dec. Dig. (Key No.)* § 92; *Cent. Dig.* § 102.

<sup>163</sup> *Terry v. Jewett*, 17 Hun (N. Y.) 395; *Sloss-Sheffield Steel & Iron Co. v. Holloway*, 144 Ala. 280, 40 South. 211. But see *San Antonio & A. P. Ry. Co. v. Long*, 87 Tex. 148, 27 S. W. 113, 24 L. R. A. 637, 47 Am. St. Rep. 87. See "Death," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 99-101.

<sup>164</sup> 78 N. Y. 338; *Id.*, 17 Hun (N. Y.) 395. It is error to permit the plaintiff to show that her intestate left no property. *Koosorowska v. Gasser* (Super. Buff.) 8 N. Y. Supp. 197. See "Death," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 99-101.

<sup>165</sup> 13 App. Cas. 800, 58 Law J. P. C. 1, 59 Law T. (N. S.) 679, 37 Wkly. Rep. 403. See *Pym v. Railway Co.*, 2 Best & S. 759.

proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in reduction of damages, must depend upon the nature of the provision, and the position and means of the deceased. When the deceased did not earn his own living, but had an income from property, one half of which had been settled upon his widow, a jury might reasonably come to a conclusion that, to the extent of that half, the widow was not a loser by his death, and might properly confine their estimate of her loss to the interest which she might probably have had in the other half."

Similarly, where the beneficiary receives money on account of an insurance policy on the life of the deceased, this fact is not to be considered in reduction of damages.<sup>186</sup> In England, however, it has been held that the jury may properly take into consideration the probable amount of future premiums which would have been payable during the life of the deceased.<sup>187</sup> Says Lord Watson in *Grand Trunk Ry. Co. v. Jennings*: "The pecuniary benefit which accrued to the respondent from his premature death consisted in the accelerated receipt of a sum of money, the consideration of which had been paid by him out of his earnings. In such case the extent of the benefit may fairly be taken to be represented by the use and interest of the money during the period of acceleration; and it was upon that footing that Lord Campbell, in *Hicks v. Newport, A. H. Ry. Co.*, suggested to the jury that, in estimating

<sup>186</sup> *Althorf v. Wolfe*, 22 N. Y. 355; *Kellogg v. New York Cent. & H. R. R. Co.*, 79 N. Y. 72; *Sherlock v. Alling*, 44 Ind. 184; *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435; *Clune v. Ristine*, 94 Fed. 745, 36 C. C. A. 450; *Carroll v. Missouri Pac. Ry. Co.*, 88 Mo. 239, 57 Am. Rep. 382; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15; *Coulter v. Pine Tp.*, 164 Pa. 543, 30 Atl. 490; *Baltimore & O. R. Co. v. Wightman's Adm'r*, 29 Grat. (Va.) 431, 26 Am. Rep. 384; *Western & A. R. Co. v. Meigs*, 74 Ga. 857. See *Harding v. Town of Townshend*, 43 Vt. 536, 5 Am. Rep. 304; *Beckett v. Railway Co.*, 8 Ont. 601, 13 Ont. App. 174, contra. See "*Death*," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 99-101.

<sup>187</sup> *Hicks v. Railway Co.*, 4 Best & S. 403, note. See *Bradburn v. Railroad Co.*, 44 Law J. Exch. 9, L. R. 10 Exch. 1, per Bramwell, B.; *Grand Trunk Ry. Co. v. Jennings*, 13 App. Cas. 800, 58 Law J. P. C. 1, 59 Law T. (N. S.) 679, 37 Wkly. Rep. 403; *Jennings v. Railway Co.*, 15 Ont. App. 477.

the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of the premiums which, if he had lived, he would have had to pay." Similarly, it is not permissible to show that the beneficiary is in receipt of a pension or other benefit from a relief fund.<sup>168</sup>

Since the right of action vests upon the death of the deceased, it is not permissible to show that pecuniary benefits have, from another source, subsequently accrued to the beneficiary, which are equivalent to those of which he has been deprived. Thus, in an action for the death of a wife and mother, evidence that the husband had again married, and that his second wife performed like services to those performed by the deceased, is inadmissible in mitigation of damages.<sup>169</sup> And in an action by a widow it cannot be shown that she has remarried.<sup>170</sup>

### DISCRETION OF JURY

#### 146. The jury have a large discretion in the assessment of damages.

From the indefinite nature of the proof of pecuniary loss possible in such cases, much is left to the discretion and judgment of the jury, and it is not improper to instruct them to

<sup>168</sup> *Geary v. Metropolitan St. R. Co.*, 73 App. Div. 441, 77 N. Y. Supp. 54; *Boulden v. Pennsylvania R. Co.*, 205 Pa. 264, 54 Atl. 906. See "Death," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 99-101.

<sup>169</sup> *Davis v. Guarneri*, 45 Ohio St. 470, 15 N. E. 350, 3 Am. St. Rep. 548; *Gulf C. & S. F. Ry. Co. v. Younger*, 90 Tex. 387, 38 S. W. 1121; *Georgia R. & Banking Co. v. Garr*, 57 Ga. 277, 24 Am. Rep. 492. It is improper on cross-examination to ask the husband if he is not engaged to be married again. *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32, 55 Am. Rep. 292. See "Death," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 99-101.

<sup>170</sup> *St. Louis, I. M. & S. R. Co. v. Cleere*, 76 Ark. 377, 88 S. W. 995; *Chicago & E. I. R. Co. v. Driscoll*, 107 Ill. App. 615, affirmed in 207 Ill. 9, 69 N. E. 620; *Consolidated Stone Co. v. Morgan*, 160 Ind. 241, 66 N. E. 696. See "Death," *Dec. Dig. (Key No.)* § 91; *Cent. Dig.* §§ 99-101.

that effect.<sup>171</sup> But such an instruction should not be given without charging them definitely upon the proper measure of damages in the particular case,<sup>172</sup> and instructing them that the damages must be based upon the evidence,<sup>173</sup> and upon the pecuniary injury to the beneficiaries;<sup>174</sup> though, as has been shown, much is left, especially in actions for the death of minor children, to the jury's knowledge and experience.<sup>175</sup>

### *New York Rule*

A looser rule in respect to the measure of damages prevails in New York than elsewhere, under similar statutory provisions; for in that state it is held in all cases that it

<sup>171</sup> *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. Ed. 591; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571; *Pennsylvania R. Co. v. Ogier*, 35 Pa. 60, 78 Am. Dec. 322; *City of Vicksburg v. McLain*, 67 Miss. 4, 6 South. 774; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83. See "Death," *Dec. Dig. (Key No.)* § 97; *Cent. Dig.* § 123.

<sup>172</sup> *Pennsylvania R. Co. v. Ogier*, 35 Pa. 60, 78 Am. Dec. 322; *Pennsylvania R. Co. v. Vandever*, 36 Pa. 298; *Catawissa R. Co. v. Armstrong*, 52 Pa. 282; *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286, 6 S. W. 464. The fact that the damages are larger than would probably upon the testimony have been found by the court is not ground for reversal. *Missouri Pac. Ry. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857. See "Death," *Dec. Dig. (Key No.)* §§ 97, 104; *Cent. Dig.* §§ 123, 142-148.

<sup>173</sup> *Hirschkovitz v. Pennsylvania R. Co. (C. C.)* 138 Fed. 438; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *North Chicago Rolling Mill Co. v. Morrissey*, 111 Ill. 646; *Chicago, M. & St. P. Ry. Co. v. Dowd*, 115 Ill. 659, 4 N. E. 368. And see *Chicago, B. & Q. R. Co. v. Sykes*, 96 Ill. 162; *Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426; *Conant v. Griffin*, 48 Ill. 410; *Lake Shore & M. S. Ry. Co. v. Parker*, 131 Ill. 557, 23 N. E. 237. See "Death," *Dec. Dig. (Key No.)* §§ 97, 104; *Cent. Dig.* §§ 123, 142-148.

<sup>174</sup> *Chicago & A. R. Co. v. Becker*, 76 Ill. 25; *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill. 88; *Balch v. Grand Rapids & I. R. Co.*, 67 Mich. 394, 34 N. W. 884; *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 184, 91 S. W. 763, 113 Am. St. Rep. 85. See "Death," *Dec. Dig. (Key No.)* §§ 97, 104; *Cent. Dig.* §§ 123, 142-148.

<sup>175</sup> *City of Chicago v. Scholten*, 75 Ill. 468; *True & True Co. v. Woda*, 104 Ill. App. 15. *Ohio & M. Ry. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774. See "Death," *Dec. Dig. (Key No.)* §§ 97, 104; *Cent. Dig.* §§ 123, 142-148.

is enough for the plaintiff to show the age, sex, condition, physical and mental, and the circumstances and situation in life of the deceased, and the age, circumstances, and condition of the next of kin, and that, provided such evidence is introduced, it is for the jury to estimate the "pecuniary injuries," present and prospective, to the next of kin. This rule differs little, if at all, from the rule elsewhere applied in actions brought by parents for the death of young children, but in New York the rule is also applied in cases in which the only possible basis for damages would seem to be the loss of prospective gifts, or of a prospective inheritance—cases in which, in other jurisdictions, some evidence either of past gifts, or of the probability of future accumulations, is usually required. Thus, in *Tilley v. Hudson River R. Co.*,<sup>176</sup> it was held that damages for the loss of the training, instruction, and education of a mother were not confined to minor children. The opinion by Hogeboom, J., upon the measure of damages, is frequently referred to with approval.<sup>177</sup> The jury, he says, "are to give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule. Within the limit of the statute, as to the amount and the species of injury sustained, the matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty

<sup>176</sup> 29 N. Y. 252, 86 Am. Dec. 297; Id., 24 N. Y. 471. See "*Death*," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

<sup>177</sup> *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, affirming 47 Barb. (N. Y.) 515. In this case the deceased was a widow about 48 years old, who left three children, all of age, one a married daughter with whom she lived. She was a seamstress, capable of earning \$1 a day above her board, and left only a small amount of property. She had been in the habit of making small articles of clothing for her children from time to time. A verdict for \$3,500 was reduced to \$1,500, and an appeal sustained for that amount. A nonsuit was granted at a former trial, and overruled in 43 Barb. (N. Y.) 532. See, also, *Keller v. New York Cent. R. Co.*, 2 Abb. Dec. (N. Y.) 480; Id., 24 How. Prac. (N. Y.) 172, affirming 17 How. Prac. (N. Y.) 102; Id., 28 Barb. (N. Y.) 44, note. See "*Death*," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 108-120.

to allow them from whatever source they actually proceeded, which could produce them. If they are satisfied, from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture or moral training which the mother had before supplied, they are at liberty to allow for it. The statute has set no bounds to the sources of these pecuniary injuries."<sup>178</sup> In *Lockwood v. New York, L. E. & W. R. Co.*<sup>179</sup> the trial court refused to charge that where the children are of full age, and living away from home, and self-supporting, no such pecuniary loss has been sustained by

<sup>178</sup> See, generally, *Dickens v. New York Cent. R. Co.*, 1 Abb. Dec. (N. Y.) 504; *Thomas v. Utica & Black River R. Co.*, 6 Civ. Proc. R. (N. Y.) 353; *Lustig v. New York, L. E. & W. R. Co.*, 65 Hun (N. Y.) 547, 20 N. Y. Supp. 477; *Bierbauer v. New York Cent. & H. R. R. Co.*, 15 Hun (N. Y.) 559, affirmed in 77 N. Y. 588. The deceased was an engineer, industrious and faithful to his mother, who was his next of kin. *Held*, that a verdict for \$5,000 was not excessive. *Erwin v. Neversink Steamboat Co.*, 23 Hun (N. Y.) 573; *Quinn v. Power*, 29 Hun (N. Y.) 183. Decedent was a single woman 36 years old, without other near relatives than her parents, who were 66 and 58 years old. Both were poor, and the father infirm, and, for 20 years decedent had contributed \$300 or \$400 per annum to their support. She was in good health, and receiving a salary of \$8 or \$9 per week. *Held*, that a verdict for \$4,000 damages was not excessive. *Bowles v. Rome, W. & O. R. Co.*, 46 Hun (N. Y.) 324. In *Kelly v. Twenty-Third St. R. Co.*, 14 Daly (N. Y.) 418, the only relatives of the deceased were a brother and sister in Ireland, and three nephews in New York. There was no evidence that he ever did anything to assist them, nor was it shown what the proceeds of his business were, nor what, if anything, was the value of his life to his next of kin. A verdict of \$1,000 was held not excessive. The court points out that the courts of New York have not discriminated between the immediate and collateral kindred, and that in other states proof is necessary that the relatives had received or were likely to receive support from the deceased. But where no facts appeared except that the deceased was a married woman aged 20 years, and a verdict of \$4,000 was rendered, it was *held* that a new trial should be granted. *Mitchell v. New York Cent. & H. R. R. Co.*, 2 Hun (N. Y.) 535. See "*Death*," *Dec. Dig. (Key No.)* §§ 86, 95; *Cent. Dig.* §§ 103-120.

<sup>179</sup> 98 N. Y. 523. See "*Death*," *Dec. Dig. (Key No.)* §§ 77, 95, 97; *Cent. Dig.* §§ 96, 108-123.

them as can be recovered. It was said on appeal: "Whatever the rule may be in other states, there are many cases in this which in principle sustain the rulings of the trial judge. \* \* \* In but few cases arising under this act is the plaintiff able to show direct, specific pecuniary loss, \* \* \* and generally the basis for the allowance of damages has to be found in the proof of the character, qualities, capacity, and condition of the deceased, and in the age, sex, circumstances, and condition of the next of kin. The proof may be unsatisfactory, and the damages may be quite uncertain and contingent; yet the jurors in each case must take the elements thus furnished, and make the best estimate of damages they can. There seems to be no other mode of administering the statute referred to, and protection against excessive damages must be found in the power of courts in some of the modes allowed by law to revise or set aside the verdicts of juries."<sup>180</sup>

*Excessive Verdict—Reduction of Amount*

In cases where the amount of the verdict is deemed by the court to be excessive, it is a common practice to allow the verdict to stand upon condition that the plaintiff remit a part of the sum awarded.<sup>181</sup> In Wisconsin, however, it is

<sup>180</sup> How slight is the protection thus afforded is illustrated by *Pineo v. New York Cent. & H. R. R. Co.*, 34 Hun (N. Y.) 80, which was an action brought by the brother as administrator of a girl of 14, whose next of kin was supposed to be her father, who had abandoned his family years before, and concerning whom it was not known whether he was alive or dead. It was held that a refusal to charge that there was no evidence that the life of deceased had any pecuniary value to her father was not error, and that a verdict of \$3,500 should not be set aside as excessive. In a dissenting opinion, Barker, J., pertinently remarks: "If we uphold this verdict, we do, in effect, say that the jury are omnipotent in this class of cases, and that there is no rule of law to be observed by them in assessing damages." See "*Death*," *Dec. Dig. (Key No.)* § 99; *Cent. Dig.* §§ 125-130; "*New Trial*," *Dec. Dig. (Key No.)* §§ 75-77; *Cent. Dig.* §§ 151-161.

<sup>181</sup> *Pym v. Railway Co.*, 2 Best & S. 759, 31 L. J. Q. B. 249, 10 Wkly. R. 737, 6 L. T. (N. S.) 537, 8 Jur. (N. S.) 819; *Id.*, 4 Best & S. 396, 32 L. J. Q. B. 377, 11 Wkly. R. 922, 10 Jur. (N. S.) 199;



held that this practice is allowable only when the illegal portion of the judgment is readily severable from the rest, and

McDonald v. Champion Iron & Steel Co., 140 Mich. 401, 103 N. W. 829; Vowell v. Issaquah Coal Co., 31 Wash. 103, 71 Pac. 725; Little Rock & Ft. S. Ry. Co. v. Barker, 39 Ark. 491; Central R. R. v. Crosby, 74 Ga. 737, 58 Am. Rep. 463; Rose v. Des Moines Val. R. Co., 39 Iowa, 246; Hutchins v. St. Paul, M. & M. Ry. Co., 44 Minn. 5, 46 N. W. 79; Smith v. Wabasha St. L. & P. Ry. Co., 93 Mo. 360, 4 S. W. 129, 1 Am. St. Rep. 729; DEMAREST v. LITTLE, 47 N. J. Law, 38, Cooley, Cas. Damages, 258; McIntyre v. New York Cent. R. Co., 37 N. Y. 287.

For recent cases discussing amount of damages properly allowed, see Nickerson v. Bigelow (D. C.) 62 Fed. 900; Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. R. Co. (C. C.) 67 Fed. 73; Weller v. Chicago, M. & St. P. Ry. Co., 120 Mo. 635, 23 S. W. 1061, and 25 S. W. 532; Riley v. Salt Lake Rapid Transit Co., 10 Utah, 428, 37 Pac. 681; Taylor, B. & H. R. Co. v. Warner (Tex. Civ. App.) 31 S. W. 66; Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 491, 40 Pac. 919; Welch v. Maine Cent. R. Co., 86 Me. 552, 30 Atl. 116, 25 L. R. A. 658; Johnson v. Long Island R. Co., 80 Hun, 306, 30 N. Y. Supp. 318; St. Louis, I. M. & S. Ry. Co. v. Sweet, 60 Ark. 550, 31 S. W. 571; Nelson v. Lake Shore & M. S. Ry. Co., 104 Mich. 582, 63 N. W. 993; International & G. N. R. Co. v. McNeel (Tex. Civ. App.) 29 S. W. 1133; Gulf, C. & S. F. Ry. Co. v. Johnson, 10 Tex. Civ. App. 254, 31 S. W. 255; McGhee v. Willis, 134 Ala. 281, 32 South. 301; Western & A. R. Co. v. Hyer, 113 Ga. 776, 39 S. E. 447; Louisville & N. R. Co. v. Scott's Adm'r, 108 Ky. 392, 56 S. W. 674, 22 Ky. Law Rep. 30, 50 L. R. A. 381; Ward v. Maine Cent. R. Co., 96 Me. 136, 51 Atl. 947; Bremer v. Minneapolis, St. P. & S. S. M. R. Co., 96 Minn. 469, 105 N. W. 494; Jackson v. Consolidated Traction Co., 59 N. J. Law, 25, 35 Atl. 754; Taylor v. Long Island R. Co., 16 App. Div. 1, 44 N. Y. Supp. 820; O'Connor v. Union Ry. Co., 67 App. Div. 99, 73 N. Y. Supp. 606; Louisville & N. R. Co. v. Satterwhite, 112 Tenn. 185, 79 S. W. 106; Citizens' Ry. Co. v. Washington, 24 Tex. Civ. App. 422, 58 S. W. 1042; Trinity Val. R. Co. v. Stewart (Tex. Civ. App.) 62 S. W. 1085; Bertha Zinc Co. v. Black's Adm'r, 88 Va. 303, 13 S. E. 452; Fox v. Oakland Consol. St. Ry., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Nelson v. Branford Lighting & Water Co., 75 Conn. 548, 54 Atl. 303; Chicago G. W. Ry. Co. v. Root, 106 Ill. App. 164; Farrell v. Chicago, R. I. & P. R. Co., 123 Iowa, 690, 99 N. W. 578, 6 L. R. A. (N. S.) 1021; Gray v. St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106; City of Omaha v. Richards, 68 N. W. 528, 49 Neb. 244; Rowe v. New York & N. J. Tel. Co., 66 N. J. Law, 19, 48 Atl. 523; Connaughton v. Sun Printing & Publishing Ass'n, 73 App. Div. 316, 76 N. Y. Supp.

hence there can be no remittitur in actions for death;<sup>182</sup> and this view has been in several cases maintained in dissenting opinions.<sup>183</sup>

### *Inadequate Verdict*

Where the damages are inadequate, the court may, in its discretion, set the verdict aside, and order a new trial.<sup>184</sup>

755; *Hoon v. Beaver Valley Traction Co.*, 204 Pa. 369, 54 Atl. 270; *Abby v. Wood*, 43 Wash. 379, 86 Pac. 558; *Hall v. North Pacific Coast R. Co.* (D. C.) 134 Fed. 309; *St. Louis, I. M. & S. R. Co. v. Hitt*, 76 Ark. 227, 88 S. W. 908, rehearing denied, 76 Ark. 227, 88 S. W. 990; *DENVER & R. G. R. CO. v. SPENCER*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121; *Cooley, Cas. Damages*, 261; *Economy Light & Power Co. v. Stephen*, 87 Ill. App. 220, judgment affirmed 187 Ill. 137, 58 N. E. 359; *Malott v. Shimer*, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278; *St. Louis & S. F. Ry. Co. v. Blinn*, 10 Kan. App. 468, 62 Pac. 427; *McCarthy v. Claffin*, 99 Me. 290, 59 Atl. 293; *King v. Ann Arbor R. Co.*, 144 Mich. 65, 107 N. W. 868, 13 Detroit Leg. N. 145; *Geismann v. Missouri-Edison Electric Co.*, 173 Mo. 654, 73 S. W. 654; *Stillings v. Metropolitan St. R. Co.*, 84 App. Div. 201, 82 N. Y. Supp. 726, affirmed 177 N. Y. 344, 69 N. E. 641; *Morhard v. Richmond Light & R. Co.*, 111 App. Div. 353, 98 N. Y. Supp. 124; *Rosenbaum v. Shoffner*, 98 Tenn. 624, 40 S. W. 1086; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518; *Dimmey v. Wheeling & E. G. R. Co.*, 27 W. Va. 32, 55 Am. Rep. 292; *Hirschkovitz v. Pennsylvania R. Co.* (C. C.) 138 Fed. 438; *Savannah Electric Co. v. Bell*, 124 Ga. 663, 53 S. E. 109; *Atchison, T. & S. F. Ry. Co. v. Ryan*, 62 Kan. 682, 64 P. 603; *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568, 93 N. W. 922; *Flaherty v. New York, N. H. & H. R. Co.* (R. I.) 35 Atl. 308; *Innes v. City of Milwaukee*, 103 Wis. 582, 79 N. W. 783. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1140; *Cent. Dig.* §§ 4462-4478; "*Damages*," *Dec. Dig. (Key No.)* § 228; *Cent. Dig.* §§ 576-579; "*New Trial*," *Dec. Dig. (Key No.)* § 162; *Cent. Dig.* §§ 324-329.

<sup>182</sup> *Potter v. Chicago & N. W. R. Co.*, 22 Wis. 615. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1140; *Cent. Dig.* §§ 4462-4478; "*Death*," *Dec. Dig. (Key No.)* § 228; *Cent. Dig.* §§ 576-579; "*New Trial*," *Dec. Dig. (Key No.)* § 162; *Cent. Dig.* §§ 324-329.

<sup>183</sup> *Little Rock & Ft. S. Ry. Co. v. Barker*, 39 Ark. 491; *Central R. R. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Rose v. Des Moines Val. R. Co.*, 39 Iowa, 246. See "*Appeal and Error*," *Dec. Dig. (Key No.)* § 1140; *Cent. Dig.* §§ 4462-4478; "*Damages*," *Dec. Dig. (Key No.)* § 162; *Cent. Dig.* §§ 324-329.

<sup>184</sup> *Mariani v. Dougherty*, 46 Cal. 27; *McCarty v. St. Louis Tran-*

### NOMINAL DAMAGES

**147. The cases are not agreed as to whether or not, in the absence of actual pecuniary loss, nominal damages may be recovered.**

Since the damages are based upon the pecuniary loss of the beneficiaries, it would seem to follow that, if there is no pecuniary loss, the action cannot be maintained for the recovery even of nominal damages. This has been intimated in England,<sup>185</sup> and held in Michigan,<sup>186</sup> Texas,<sup>187</sup> Vermont,<sup>188</sup> and Wisconsin.<sup>189</sup> Thus, in *Duckworth v. Johnson*, Pollock, C. B., said: "If there was no damage the action is not maintainable. It appears to me that it was intended by the act to give compensation for damage sustained, and not

sit Co., 192 Mo. 396, 91 S. W. 132; *Connor v. City of New York*, 28 App. Div. 186, 50 N. Y. Supp. 972; *Wolford v. Lyon Gravel Min. Co.*, 63 Cal. 483; *James v. Richmond & D. R. Co.*, 92 Ala. 231, 9 South. 335. See "Death," *Dec. Dig. (Key No.)* § 98; *Cent. Dig.* § 124.

<sup>185</sup> *Duckworth v. Johnson*, 4 Hurl. & N. 653, 29 L. J. Exch. 25, 5 Jur. (N. S.) 630. See *Boulter v. Webster*, 13 Wkly. R. 289, 11 L. T. (N. S.) 598. In the earlier case of *Chapman v. Rothwell*, El. Bl. & El. 168, Crompton, J., had said that section 1 of Lord Campbell's act appears to contemplate giving damages, wherever the party injured could have recovered them, whether nominal or not. The jury found a verdict of £1 for the widow, and 10s. for each of the children. The court granted a new trial, without imposing costs on the plaintiff, on the ground that the jury had shrunk from their duty of deciding the issue. *Springett v. Balls*, 7 Best & S. 477, 4 Fost. & F. 472. See "Death," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 97.

<sup>186</sup> *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539, 48 N. W. 44; *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530, 44 N. W. 321; *Charlebois v. Gogebic & M. R. R. Co.*, 91 Mich. 59, 51 N. W. 812. See "Death," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 97.

<sup>187</sup> *McGown v. International & G. N. Ry. Co.*, 85 Tex. 289, 20 S. W. 80. See "Death," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 97.

<sup>188</sup> *LAZELLE v. TOWN OF NEWFANE*, 70 Vt. 440, 41 Atl. 511, Cooley, Cas. Damages, 263. See "Death," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 97.

<sup>189</sup> *Regan v. Chicago M. & St. P. Ry. Co.*, 51 Wis. 599, 8 N. W. 293. See "Death," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 97.

to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs." And in *Hurst v. Detroit City Ry. Co.*,<sup>190</sup> Long, J., said: "The statute does not imply that damages and pecuniary loss necessarily flow from the negligent killing." On the other hand, it has been held, or rather intimated, in a great number of cases, that damages do necessarily flow from the negligent killing, and that whenever there is proof of the negligence of the defendant, and of the existence of next of kin, the action lies for at least nominal damages;<sup>191</sup> although the question of nominal damages has in few cases been actually involved in the decision.<sup>192</sup>

<sup>190</sup> 84 Mich. 539, 48 N. W. 44. See "*Death*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 97.

<sup>191</sup> *Alabama Mineral R. Co. v. Jones*, 121 Ala. 113, 25 South. 314; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Chicago & N. W. Ry. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Chicago, City of v. Scholten*, 75 Ill. 463; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Quin v. Moore*, 15 N. Y. 432; *Dickens v. New York Cent. R. Co.*, 1 Abb. Dec. (N. Y.) 504; *Ihl v. Forty-Second St. & G. St. Ferry R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *Lehman v. City of Brooklyn*, 29 Barb. (N. Y.) 234; *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; *Jenkins v. Hankins*, 98 Tenn. 545, 41 S. W. 1028. The jury are not restricted to an award of nominal damages only, because the evidence fails to show with any certainty the extent of a sister's pecuniary loss, where she had been partly supported by deceased. *Ohio & M. Ry. Co. v. Wangelin*, 152 Ill. 138, 38 N. E. 760. See, also, *North Chicago St. R. Co. v. Brodie*, 156 Ill. 317, 40 N. E. 942. Where the heirs of the deceased are collateral relatives, only nominal damages can be recovered. In *re California Nav. & Imp. Co. (D. C.)* 110 Fed. 670; *Burk v. Arcata & M. R. R. Co.*, 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52; *Falkenau v. Rowland*, 70 Ill. App. 20. See "*Death*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 97.

<sup>192</sup> *Johnston v. Cleveland & T. R. Co.*, 7 Ohio St. 336, 70 Am. Dec. 75; *Kenney v. New York Cent. & H. R. R. Co.*, 49 Hun, 535, 2 N. Y. Supp. 512; *Korrady v. Lake Shore & M. S. Ry. Co.*, 131 Ind. 261, 29 N. E. 1069. See "*Death*," *Dec. Dig. (Key No.)* § 79; *Cent. Dig.* § 97.

### ALLEGATION OF DAMAGES

**148. Substantial damages may be recovered under the general ad damnum in those jurisdictions where nominal damages may be recovered, i. e. where some damages are presumed. In jurisdictions where nominal damages cannot be recovered, the damages must be specially pleaded.**

As has been stated, it is held in some jurisdictions that the statute necessarily implies pecuniary loss to the beneficiaries from the death, and that the action can consequently be maintained in the absence of pecuniary loss for at least nominal damages; while in other jurisdictions it is held that, without pecuniary loss, the action is not maintainable, even for nominal damages.<sup>193</sup> In the latter jurisdictions it appears to be necessary to allege in the complaint the facts showing pecuniary loss. Thus, in Michigan it is said that the damages are special, and that it must be made to appear by proper allegations that pecuniary loss necessarily resulted.<sup>194</sup> And in Wisconsin it is held that the complaint must allege facts showing that loss, present or prospective, has resulted,<sup>195</sup> although in the latter state, where the complaint showed that the deceased was a laboring man, working for the defendant (without alleging that he received any compensation), and that he left a child of three years, it was held on demurrer that it sufficiently showed that the child had suffered pecuniary loss.<sup>196</sup>

<sup>193</sup> See ante, p. 488.

<sup>194</sup> *Hurst v. Detroit City Ry. Co.*, 84 Mich. 539, 48 N. W. 44. See "Damages," *Dec. Dig. (Key No.)* §§ 141, 142, 153; *Cent. Dig.* §§ 406-425.

<sup>195</sup> *Regan v. Chicago, M. & St. P. Ry. Co.*, 51 Wis. 599, 8 N. W. 292. But in *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613, where an element in the pecuniary injury was the loss of a pension cut off by the death of deceased, it was held unnecessary to allege this fact in order to admit proof of it. See "Damages," *Dec. Dig. (Key No.)* §§ 141, 142, 153; *Cent. Dig.* §§ 406-425.

<sup>196</sup> *Kelley v. Chicago, M. & St. P. Ry. Co.*, 50 Wis. 381, 7 N. W. 291. See "Damages," *Dec. Dig. (Key No.)* §§ 141, 142, 153; *Cent. Dig.* §§ 406-425.

On the other hand, in jurisdictions where it is held that nominal damages necessarily result from the death, it seems that a complaint is good on demurrer although it does not allege more than the death and the survival of beneficiaries. Thus, in New York, in an action for the benefit of a widow, the complaint was held good on demurrer notwithstanding that it contained no allegations that damages had been sustained, although the court declined to express an opinion whether, without further allegations, proof of substantial damages would be admissible.<sup>197</sup> And, in an Indiana case, a complaint which showed that the deceased left a widow and infant children surviving was held good on demurrer although it did not directly allege that the beneficiaries sustained actual damages; the court saying that the legal presumption is that the infant children and wife are entitled to the services of a father and husband, and that such services are valuable to them.<sup>198</sup> In order to allow proof of damages in these jurisdictions, it appears to be sufficient to allege that the beneficiaries have sustained damages in a certain amount.<sup>199</sup> It has been held in Indiana, however, in an action by a father for the death of a minor child, that, in

<sup>197</sup> *Kenney v. New York Cent. & H. R. R. Co.*, 49 Hun, 535, 2 N. Y. Supp. 512; *Pizzie v. Reid*, 72 App. Div. 162, 76 N. Y. Supp. 306. See "Damages," *Dec. Dig. (Key No.)* §§ 141-145; *Cent. Dig.* §§ 406-413.

<sup>198</sup> *Korrady v. Lake Shore & M. S. Ry. Co.*, 131 Ind. 261, 29 N. E. 1069. See "Damages," *Dec. Dig. (Key No.)* §§ 141-145; *Cent. Dig.* §§ 406-413.

<sup>199</sup> *Safford v. Drew*, 3 Duer (N. Y.) 627; *Louisville, N. A. & C. Ry. Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, 3 L. R. A. 520, 9 Am. St. Rep. 883; *Barron v. Illinois Cent. R. Co.*, 1 Biss. 412, Fed. Cas. No. 1,052; *Serensen v. Northern Pac. R. Co. (C. C.)* 45 Fed. 407; *Barnum v. Chicago, M. & St. P. Ry. Co.*, 30 Minn. 461, 18 N. W. 364. See, also, *Westcott v. Central Vt. R. Co.*, 61 Vt. 438, 17 Atl. 745; *Ewen v. Chicago & N. W. Ry. Co.*, supra; *Kenney v. New York Cent. & H. R. R. Co.*, supra. The declaration averred that by the death the widow and minor children were deprived of their support and the children of their means of education, to the damage, etc. Held, that such averments were sufficient to admit evidence of the ability of deceased to earn money. *Chicago & A. Ry. Co. v. Carey*, 115 Ill. 115, 3 N. E. 519. See "Damages," *Dec. Dig. (Key No.)* §§ 141-145; *Cent. Dig.* §§ 406-413.

order to recover for loss of services beyond the date of the beginning of suit, such damages must be specially averred.<sup>200</sup> And a California case has held that damages for funeral expenses, if recoverable at all, must be specially alleged.<sup>201</sup>

<sup>200</sup> *Pennsylvania Co. v. Lilly*, 73 Ind. 352. See "Damages," *Dec. Dig. (Key No.)* §§ 141, 142, 148; *Cent. Dig.* §§ 406-413.

<sup>201</sup> *Gay v. Winter*, 34 Cal. 153. Compare *International & G. N. R. Co. v. Boykin*, 33 Tex. Civ. App. 73, 74 S. W. 93. See "Damages," *Dec. Dig. (Key No.)* §§ 141-148; *Cent. Dig.* §§ 406-413.

## CHAPTER XIII

### WRONGS AFFECTING REAL PROPERTY

- 149-151. Damages for Detention of Real Property.
- 153. Damages for Detention of Dower.
- 153-154. Injuries to Real Property—Trespasses.
- 155-156. Nuisance.
- 157-158. Waste.
- 159. Contracts to Sell Real Property—Breach by Vendor.
- 160. Breach by Vendee.
- 161. Breach of Covenants—Seisin and Right to Convey.
- 162. Warranty and Quiet Enjoyment.
- 163. Against Incumbrances.
- 164. Covenants in Leases.

### DAMAGES FOR DETENTION OF REAL PROPERTY

- 149. In actions to recover the possession of real property, the measure of damages is the annual value of the land, with interest, less necessary expenses paid by the occupant, and the value of improvements made by him in good faith.
- 150. The occupant is liable for the profits for the whole time he has been in possession, unless, as in most states, some statute of limitations limits the right of recovery.
- 151. In an action for mesne profits, the costs of a previous ejectment suit and, as sometimes held, reasonable attorney's fees, may be recovered, in addition to the annual value of the land.

#### *Whether Damages Recoverable in Ejectment*

In some states, in an action of ejectment to recover the possession of land wrongfully held by another, no damages



for the wrongful detention can be recovered.<sup>1</sup> If the plaintiff in ejectment succeeds, he recovers the possession, with mere nominal damages.<sup>2</sup> To recover his substantial damages he must resort to a subsequent action of trespass for mesne profits.<sup>3</sup> But in other states the possession and damages for the detention are recovered in one action,—either ejectment, or trespass to try title,<sup>4</sup> or in a similar statutory action.

### *The Annual Value—How Estimated*

In both classes of states the measure of damages is the same. It is the annual value of the premises;<sup>5</sup> not what the occupant actually received, but what should have been received.<sup>6</sup> The amount of rent received by the defendant from

<sup>1</sup> *Goodtitle v. Tombs*, 3 Wils. 118; *Van Alen v. Rogers*, 1 Johns. Cas. (N. Y.) 281, 1 Am. Dec. 113; *Harvey v. Snow*, 1 Yeates (Pa.) 156; *Davis v. Doe ex dem. Delpit*, 25 Miss. 445; *Emrich v. Ireland*, 55 Miss. 390. See "*Ejectment*," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 438–453.

<sup>2</sup> *Van Alen v. Rogers*, 1 Johns. Cas. (N. Y.) 281. See "*Ejectment*," *Dec. Dig. (Key No.)* § 126; *Cent. Dig.* § 437.

<sup>3</sup> *Morgan v. Varick*, 8 Wend. (N. Y.) 587; *Benson v. Matsdorf*, 2 Johns. (N. Y.) 369; *Mitchell v. Mitchell*, 1 Md. 55; *Blount v. Garen*, 3 Hayw. (Tenn.) 88; *Goodtitle v. Tombs*, 3 Wils. 118. See "*Ejectment*," *Dec. Dig. (Key No.)* § 128; *Cent. Dig.* §§ 438–456.

<sup>4</sup> *Boyd's Lessee v. Cowan*, 4 Dall. (Pa.) 138, 1 L. Ed. 774; *Battin v. Bigelow*, Pet. C. C. 452, Fed. Cas. No. 1,108; *Miller v. Melchoer*, 35 N. C. 439. See "*Ejectment*," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 438–453; "*Trespass to Try Title*," *Dec. Dig. (Key No.)* § 53; *Cent. Dig.* §§ 83–86.

<sup>5</sup> *New Orleans v. Gaines*, 15 Wall. 624, 21 L. Ed. 215; *Hauleman v. Turner*, 112 Fed. 41, 50 C. C. A. 110; *Larwell v. Stevens* (C. C.) 12 Fed. 559; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Curry v. Sandusky Fisk Co.*, 88 Minn. 485, 93 N. W. 896; *Willis v. McKinnou*, 79 App. Div. 249, 79 N. Y. Supp. 936, affirmed in 178 N. Y. 451, 70 N. E. 962; *Taylor v. Taylor*, 43 N. Y. 578; *Ege v. Kille*, 84 Pa. 333; *Morrison v. Robinson*, 31 Pa. 456; *Averett v. Brady*, 20 Ga. 523. See, also, *Acme Brewing Co. v. Central R. & Banking Co.*, 115 Ga. 494, 42 S. E. 8. See "*Ejectment*," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 444–452.

<sup>6</sup> *Woodhull v. Rosenthal*, 61 N. Y. 382; *Campbell v. Brown*, 2 Woods, 349, Fed. Cas. No. 2,355; *Bolling v. Lersner*, 26 Grat. (Va.) 36. But see *Rabb v. Patterson*, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743; *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321. See "*Ejectment*," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 444–452.

his lessee does not establish the value of the premises.<sup>7</sup> When the premises are of such a character that they could yield no income, and consequently no profit has been received by the occupant, no damages are recoverable.<sup>8</sup>

### *Interest*

The plaintiff may also recover interest on the sums the defendant has received or should have received as the income of the land.<sup>9</sup> In a New York case it was held that, where the rents had been paid quarterly, the interest should be computed quarterly.<sup>10</sup> The Massachusetts courts have held otherwise.<sup>11</sup>

### *Deductions for Necessary Expenses*

The defendant may deduct, from the amount received as the income of the land, necessary expenses paid by him, such as taxes,<sup>12</sup> repairs,<sup>13</sup> and a ground rent which the plaintiff would have had to pay.<sup>14</sup>

### *Same—For Improvements*

When the occupant has made valuable improvements on

<sup>7</sup> *Kille v. Ege*, 82 Pa. 102. See "Ejectment," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 444-452.

<sup>8</sup> *Griffey v. Kennard*, 24 Neb. 174, 38 N. W. 791 (uncultivated prairie land). See "Ejectment," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 444-452.

<sup>9</sup> *New Orleans v. Gaines*, 15 Wall. 624, 21 L. Ed. 215; *Sopp v. Winpenny*, 68 Pa. 78; *Vandervoort v. Gould*, 36 N. Y. 639; *Dobbins v. Baker*, 80 Ind. 52. Contra, *Allen v. Smith*, 63 Mo. 103. See "Ejectment," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* § 448.

<sup>10</sup> *Jackson v. Wood*, 24 Wend. (N. Y.) 443. See "Ejectment," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* § 448.

<sup>11</sup> *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. 502. See "Ejectment," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* § 448.

<sup>12</sup> *Wallace v. Berdell*, 101 N. Y. 13, 3 N. E. 769; *Ringhouse v. Keener*, 63 Ill. 230; *Semple v. Bank of British Columbia*, 5 Sawy. 394, Fed. Cas. No. 12,660. See "Ejectment," *Dec. Dig. (Key No.)* §§ 142, 143; *Cent. Dig.* §§ 472-508.

<sup>13</sup> *Semple v. Bank of British Columbia*, 5 Sawy. 394, Fed. Cas. No. 12,660. And see *Ewalt v. Gray*, 6 Watts (Pa.) 427. See "Ejectment," *Dec. Dig. (Key No.)* §§ 142, 143; *Cent. Dig.* §§ 472-501.

<sup>14</sup> *Doe v. Hare*, 2 Crompt. & M. 145. See "Ejectment," *Dec. Dig. (Key No.)* §§ 142, 143; *Cent. Dig.* §§ 472-501.

the land, which will be a benefit to the plaintiff, their value may be set off against the latter's claim for damages.<sup>15</sup> The improvements must have been made, however, by one who acted in good faith, believing that he had title to the land, or no allowance will be made.<sup>16</sup>

The reasons for allowing deductions for improvements were well stated, in a Massachusetts case,<sup>17</sup> substantially as follows: The measure of damages should be, in an action of trespass for mesne profits, a sum which, upon just and equitable principles, will furnish such compensation or indemnity. The plaintiff should be placed in as good a position as he would have been in if the defendants had not dispossessed him. It seems clear that a plaintiff's claim that he is entitled to the whole amount of the rents and profits from the improved estate, without any deduction for such improvements, would be unjust and unreasonable. He would thus receive more than compensation.

#### *For How Long Profits Recoverable*

The plaintiff, in an action for mesne profits, may recover damages from the time his right to possession accrued<sup>18</sup> up

<sup>15</sup> *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547; *Morrison v. Robinson*, 31 Pa. 456; *Woodhull v. Rosenthal*, 61 N. Y. 396; *Hicks v. Blakeman*, 74 Miss. 459, 21 South. 400; *Bedell v. Shaw*, 59 N. Y. 46; *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. 502; *Thomas v. Thomas' Ex'r*, 16 B. Mon. (Ky.) 420; *Stark v. Starr*, 1 Sawy. 15, Fed. Cas. No. 13,307; *Wisdom v. Reeves* (Ala.) 18 South. 13. Compare *Hardeman v. Turner*, 112 Fed. 41, 50 C. C. A. 110; *McCarver v. Doe ex dem Herzberg*, 135 Ala. 542, 33 South. 486. See "*Ejectment*," *Dec. Dig. (Key No.)* § 143; *Cent. Dig.* §§ 502-508.

<sup>16</sup> *Campbell v. Brown*, 2 Woods, 349, Fed. Cas. No. 2,355; *Dothage v. Stuart*, 35 Mo. 251; *Brown v. Baldwin*, 121 Mo. 106, 25 S. W. 858. See "*Ejectment*," *Dec. Dig. (Key No.)* § 142; *Cent. Dig.* §§ 472-501.

<sup>17</sup> *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. 502. And see *Deitzler v. Wilhite*, 55 Kan. 200, 40 Pac. 272. See "*Ejectment*," *Dec. Dig. (Key No.)* §§ 139, 142, 143; *Cent. Dig.* §§ 446, 468-508.

<sup>18</sup> *Danziger v. Boyd*, 120 N. Y. 628, 24 N. E. 482; *Clark v. Boyreau*, 14 Cal. 634; *King v. Little*, 77 N. C. 138; *Roberts v. St. Louis Merchants' Land Imp. Co.*, 126 Mo. 460, 29 S. W. 584; *Griffith v. Owensboro & N. R. Co.*, 97 Ky. 139, 30 S. W. 208. See "*Ejectment*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 449-451.

to the time the defendant gives up the possession.<sup>19</sup> This is the rule in the absence of some statute of limitations applicable to such actions.<sup>20</sup> But in most states the right of recovery is limited to a few years before the action is begun,<sup>21</sup> generally six years.<sup>22</sup>

### *Costs of the Ejectment Suit*

Where, owing to the technical form of the action of ejectment, no costs were recovered, they may be made a part of the damages in a subsequent action for mesne profits.<sup>23</sup> In England reasonable counsel fees in the ejectment action may be recovered.<sup>24</sup> The same has been held in this country in some cases,<sup>25</sup> and denied in others.<sup>26</sup>

<sup>19</sup> *Danziger v. Boyd*, 120 N. Y. 628, 24 N. E. 482; *Gilman v. Gilman*, 111 N. Y. 265, 18 N. E. 849; *McCrudd v. Bray*, 36 Wis. 333; *Mitchell v. Freedley*, 10 Pa. 198; *Pendergast v. McCaslin*, 2 Ind. 87; *Bell v. Medford*, 57 Miss. 31. See "*Ejectment*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 449-451.

<sup>20</sup> *New Orleans v. Gaines*, 15 Wall. 624, 21 L. Ed. 215. See "*Ejectment*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 449-452.

<sup>21</sup> *Gatton v. Tolley*, 22 Kan. 678; *Ringhouse v. Keener*, 63 Ill. 230; *Herreshoff v. Tripp*, 15 R. I. 92, 23 Atl. 104. But see *Budd v. Walker*, 9 Barb. (N. Y.) 493; *Gaslight Co. v. Rome, W. & O. R. Co.*, 51 Hun, 119, 5 N. Y. Supp. 459. See "*Ejectment*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* § 44.

<sup>22</sup> *Jackson v. Wood*, 24 Wend. (N. Y.) 443; *Hill v. Myers*, 46 Pa. 15. See "*Ejectment*," *Dec. Dig. (Key No.)* § 139; *Cent. Dig.* §§ 449-451.

<sup>23</sup> *Baron v. Abeel*, 3 Johns. (N. Y.) 481, 3 Am. Dec. 515; *Doe ex dem. Trustees of Augusta v. Perkins*, 8 B. Mon. (Ky.) 198; *Tate v. Doe ex dem. Weir*, 24 Miss. 465; *Aslin v. Parkin*, 2 Burrows, 665; *Pearse v. Coaker*, L. R. 4 Exch. 92; *Doe v. Davis*, 1 Esp. 358; *Nowel v. Roake*, 7 Barn. & C. 404. But see *Hunt v. O'Neill*, 44 N. J. Law, 564; *Doe v. Filliter*, 13 Mees. & W. 47. See "*Ejectment*," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 442, 445-452.

<sup>24</sup> *Doe v. Huddart*, 4 Dowl. 437.

<sup>25</sup> *Doe ex dem. Trustees of Augusta v. Perkins*, 8 B. Mon. (Ky.) 198; *Denn ex dem. Delatouche v. Chubb*, 1 N. J. Law, 466. And see *Gibson, C. J.*, in *Alexander v. Herr's Ex'rs*, 11 Pa. 537, 539. See "*Ejectment*," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 442-452.

<sup>26</sup> *Herreshoff v. Tripp*, 15 R. I. 92, 23 Atl. 104; *White v. Clack*, 2 Swan (Tenn.) 230; *Alexander v. Herr's Ex'rs*, 11 Pa. 537. See "*Ejectment*," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 442-452.

**SAME—DAMAGES FOR DETENTION OF DOWER**

**152. For the wrongful detention of her dower a widow is entitled to one-third the net annual value of the land. This is computed:**

- (a) Against an heir from the death of the husband.**
- (b) Against an alienee, from the time of demand.**

Damages for detention of dower were first made recoverable by the statute of Merton,<sup>27</sup> and the subject is largely regulated by statute in the United States.<sup>28</sup> The amount of damages is computed on the same basis as for the detention of real property in other cases; that is, the net value of the land. But in the case of a widow suing for detention of dower, only one-third of the husband's whole estate is recoverable, that being the share of her husband's land to which she is entitled by the common law.<sup>29</sup> Against an alienee of the husband, damages can only be recovered from the time of demand.<sup>30</sup> As to the alienee of the heir, the rule is not uniform.<sup>31</sup> The heir can defeat a claim for damages by pleading

<sup>27</sup> 20 Hen. III. c. 1.

<sup>28</sup> See 1 Stim. Am. St. Law, § 3278; 2 Scrib. Dower (2d Ed.) 700. In many states the husband must die seised. 2 Scrib. Dower (2d Ed.) 702. In some states damages can be recovered for only a few years prior to the suit. 1 Stim. Am. St. Law, § 3278.

<sup>29</sup> Rea v. Rea, 63 Mich. 257, 29 N. W. 703; Brown v. Morisey, 126 N. C. 772, 36 S. E. 284; Henderson v. Chaires, 35 Fla. 423, 17 South. 574; Stull v. Graham, 60 Ark. 461, 31 S. W. 46; Penrice v. Penrice, Barnes, Notes Cas. 234. And see Gorden v. Gorden, 80 App. Div. 258, 80 N. Y. Supp. 241. See "Dower," Dec. Dig. (Key No.) § 105; Cent. Dig. § 189.

<sup>30</sup> McClanahan v. Porter, 10 Mo. 746; Thrasher v. Tyack, 15 Wis. 256; Sellman v. Bowen, 8 Gill. & J. (Md.) 50, 29 Am. Dec. 524; Layton v. Butler, 4 Har. (Del.) 507; Beavers v. Smith, 11 Ala. 20; Davis v. Logan, 9 Dana (Ky.) 185; Roan v. Holmes, 32 Fla. 295, 13 South. 339. That no damages are recoverable, see Sharp v. Pettit, 3 Yeates (Pa.) 38; Gannon v. Widman, 3 Pa. Dist. R. 835; Marshall v. Anderson, 1 B. Mon. (Ky.) 198. See "Dower," Dec. Dig. (Key No.) § 105; Cent. Dig. § 189.

<sup>31</sup> As holding damages recoverable from husband's death, see 2 Scrib. Dower (2d Ed.) 715; Seaton v. Jamison, 7 Watts (Pa.)

that he has been always ready—"tout temps prist"—to assign dower if it had been demanded.<sup>32</sup> Except as changed by statute, the death of the widow during the proceeding abates both the suit and all claim for damages.<sup>33</sup>

### INJURIES TO REAL PROPERTY—TRESPASSES

**153.** For trespasses to real property which produce only temporary injuries, the measure of damages is the loss in rental value for the time the injury continues.

**154.** For permanent injuries, the measure is the loss in market value; but if this is greater than the cost of repairing the injury, then the cost of repairing plus the loss of the use of the land is the measure of damages.

#### *Temporary Injuries*

Where the injury to the plaintiff's land was one which has ceased or one which the trespasser has remedied, the only damages to which the owner is entitled are such as result from the loss of use of the land, or the diminution in rental value.<sup>34</sup>

533; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290, 5 Am. Dec. 239. From demand, 2 Scrib. Dower (2d Ed.) 714. See "*Dower*," *Dec. Dig. (Key No.)* § 106; *Cent. Dig.* §§ 189-196.

<sup>32</sup> Scrib. Dower (2d Ed.) 707.

<sup>33</sup> *Rowe v. Johnson*, 19 Me. 146; *Sandback v. Quigley*, 8 Watts (Pa.) 460; *Atkins v. Yeomans*, 6 Metc. (Mass.) 438; *Turner v. Smith*, 14 Ill. 242; *Hildreth v. Thompson*, 16 Mass. 191; *Roan v. Holmes*, 32 Fla. 295, 13 South. 339, 21 L. R. A. 180. But that they may be recovered if the action pending is in equity, see *Pollitt v. Kerr*, 49 N. J. Eq. 65, 22 Atl. 800. See "*Dower*," *Dec. Dig. (Key No.)* §§ 105, 106; *Cent. Dig.* §§ 189-196.

<sup>34</sup> *Burditt v. New York Cent. & H. R. Co.*, 71 Hun, 361, 24 N. Y. Supp. 1137; *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Iowa, 659, 38 N. W. 545, 7 Am. St. Rep. 501; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *Ellington v. Bennett*, 59 Ga. 286. But see *Negley v. Cowell*, 91 Iowa, 256, 59 N. W. 48, 51 Am. St. Rep. 344; *Barrick v. Schifferdecker*, 123 N. Y. 52, 25 N. E. 365. See "*Damages*," *Dec. Dig. (Key No.)* § 109; *Cent. Dig.* §§ 273-278; "*Trespass*," *Dec. Dig. (Key No.)* §§ 47-50; *Cent. Dig.* §§ 128-136.

Thus, in an action for flowing plaintiff's land, the damages would be the lessened value of the property for the time it was flooded.<sup>35</sup> And for a diversion of water, the plaintiff could recover the value of its use.<sup>36</sup>

### *Permanent Injuries*

By "permanent injuries" is not meant those which are irreparable, but merely injuries which will continue unless steps are taken to remedy them. The diminution in the market value of the premises is the measure of damages, when that is less than the cost of repairing. Thus, where fruit or ornamental trees are destroyed, the damages are measured by the depreciation in the value of the land caused thereby, not by the value of the trees when severed.<sup>37</sup> It is sometimes said that, when full grown timber trees are cut

<sup>35</sup> *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171; *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Iowa, 659, 38 N. W. 545, 7 Am. St. Rep. 501. Cf. *Falsom v. Apple River Log-Driving Co.*, 41 Wis. 602. See "Damages," *Dec. Dig. (Key No.)* § 109; *Cent. Dig.* §§ 273-278.

<sup>36</sup> *Pollett v. Long*, 58 Barb. (N. Y.) 20. In *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66, the jury were allowed to consider evidence of profits lost by defendant's dam causing water to set back on plaintiff's mill. See "Damages," *Dec. Dig. (Key No.)* § 109; *Cent. Dig.* §§ 273-278.

<sup>37</sup> *Carter v. Pitcher*, 87 Hun, 580, 34 N. Y. Supp. 549; *Edsall v. Howell*, 86 Hun, 424, 33 N. Y. Supp. 892; *Dwight v. Elmira, C. & N. R. Co.*, 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612, 28 Am. St. Rep. 563; *Nixon v. Stillwell*, 52 Hun, 353, 5 N. Y. Supp. 248; *Eldridge v. Gorman*, 77 Conn. 699, 60 Atl. 643; *GILMAN v. BROWN*, 115 Wis. 1, 91 N. W. 227, *Cooley, Cas. Damages*, 268; *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401; *Mitchell v. Billingsley*, 17 Ala. 391; *Wallace v. Goodall*, 18 N. H. 439; *Lowery v. Rowland*, 104 Ala. 420, 16 South. 88. And see, as to other injuries, *Fisher v. Naysmith*, 106 Mich. 71, 64 N. W. 19; *Chicago & A. R. Co. v. Robbins*, 54 Ill. App. 611; *International & G. N. Ry. Co. v. Davis* (Tex. Civ. App.) 29 S. W. 483; *O'Connor v. Shannon* (Tex. Civ. App.) 30 S. W. 1096; *Louisville, N. A. & C. Ry. Co. v. Sparks*, 12 Ind. App. 410, 40 N. E. 546; *Southern Marble Co. v. Darnell*, 94 Ga. 231, 21 S. E. 531. But cf. *Board of Com'rs of Rush County v. Trees*, 12 Ind. App. 479, 40 N. E. 535; *Hurley v. Jones*, 165 Pa. St. 34, 30 Atl. 499. See "Damages," *Dec. Dig. (Key No.)* §§ 110-112; *Cent. Dig.* §§ 273-283; "Railroads," *Cent. Dig.* § 1737.

and removed by a trespasser, the measure of damages is the value of the trees. The value of the trees is rather evidence of the amount of damages than its measure, but the result obtained in the case of timber trees is the same in either case,<sup>38</sup> though it would not be for fruit or ornamental trees, or probably for growing timber trees.<sup>39</sup> The same principles hold good when minerals are wrongfully mined on plaintiff's land. The value of the coal or ore may be evidence of the amount in which the plaintiff has been damaged, but the measure of damages is the diminished value of the realty.<sup>40</sup>

\* *E. E. Bolles Wooden Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *White v. Yawkey*, 108 Ala. 270, 19 South. 360, 32 L. R. A. 199, 54 Am. St. Rep. 159; *Miller v. Wellman*, 75 Mich. 353, 43 N. W. 843; *Disbrow v. Westchester Hardware Co.*, 164 N. Y. 415, 58 N. E. 519; *Winchester v. Craig*, 33 Mich. 205; *Michigan Land & Iron Co. v. Deer Lake Co.*, 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491; *Cotter v. Plumer*, 72 Wis. 476, 40 N. W. 379; *Webster v. Moe*, 35 Wis. 75; *Carner v. Chicago, St. P., M. & O. Ry. Co.*, 43 Minn. 375, 45 N. W. 713; *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426; *Kolb v. Bankhead*, 18 Tex. 229; *Central Railroad & Banking Co. v. Murray*, 93 Ga. 256, 20 S. E. 129. Cf. *Single v. Schneider*, 24 Wis. 299; *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 25 L. R. A. 813, 44 Am. St. Rep. 439. See "*Damages*," *Dec. Dig. (Key No.)* §§ 110-112; *Cent. Dig.* §§ 273-283.

\* *Dwight v. Elmira, C. & N. R. Co.*, 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612, 28 Am. St. Rep. 563; *Argotsinger v. Vines*, 82 N. Y. 308; *Nixon v. Stillwell*, 52 Hun, 353, 5 N. Y. Supp. 248. See "*Damages*," *Dec. Dig. (Key No.)* §§ 110-112; *Cent. Dig.* §§ 273-283.

\* *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *United States v. Magoon*, 3 McLean, 171, Fed. Cas. No. 15,707; *Barton Coal Co. v. Cox*, 39 Md. 1, 17 Am. Rep. 525; *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280. That the measure of damage is the value of the coal or ore at the top of the shaft, less the cost of raising it, see *Aurora Hill Consol. Min. Co. v. Eighty-Five Min. Co. (C. C.)* 12 Sawy. 355, 34 Fed. 515; *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617; *Chamberlain v. Collinson*, 45 Iowa, 429; *Austin v. Huntsville Coal & Min. Co.*, 72 Mo. 535, 37 Am. Rep. 446. That it is the value after it is severed, see *Illinois & St. L. R. & Coal Co. v. Ogle*, 82 Ill. 627, 25 Am. Rep. 342; *McLean County Coal Co. v. Long*, 81 Ill. 359; *Omaha & Grant Smelting & Refining Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185; *Sunnyside Coal & Coke Co. v.*



This is also the measure which has been applied to actions for injuries resulting from the removal of lateral support,<sup>41</sup> for the destruction of a meadow,<sup>42</sup> and for the unlawful filling up of a mill pond.<sup>43</sup> If the plaintiff proves no actual damages, the trespass, nevertheless, entitles him to nominal damages.<sup>44</sup>

### *Cost of Repairing*

Where the injuries to the realty can be repaired, and that without greater expense than the diminution in the value of the land if no repairs were made, then the cost of restoring the realty to its condition before the trespass is the measure

Reitz (Ind. App.) 39 N. E. 541. But see *Martin v. Porter*, 5 Mees. & W. 351. See "*Damages*," *Dec. Dig. (Key No.)* § 110; *Cent. Dig.* §§ 273-278.

<sup>41</sup> *Gilmore v. Driscoll*, 123 Mass. 199, 23 Am. Rep. 312; *Kopp v. Northern Pac. R. Co.*, 41 Minn. 310, 43 N. W. 73; *Moellering v. Evans*, 121 Ind. 195, 23 N. E. 989, 6 L. R. A. 449; *McGuire v. Grant*, 25 N. J. Law, 356, 67 Am. Dec. 49. But see *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57. See "*Adjoining Landowners*," *Dec. Dig. (Key No.)* § 4; *Cent. Dig.* § 41; "*Damages*," *Dec. Dig. (Key No.)* §§ 110, 111; *Cent. Dig.* §§ 273-278.

<sup>42</sup> *Ft. Worth & D. C. Ry. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365; *Ft. Worth & N. O. Ry. Co. v. Wallace*, 74 Tex. 581, 12 S. W. 227. But see *Vermilya v. Chicago, M. & St. P. Ry. Co.*, 66 Iowa, 606, 24 N. W. 234, 55 Am. Rep. 279. For various rules as to the measure of damages for the destruction of crops, see *King v. Fowler*, 14 Pick. (Mass.) 238; *Richardson v. Northrup*, 66 Barb. (N. Y.) 85; *Folsom v. Apple River Log-Driving Co.*, 41 Wis. 602; *Drake v. Chicago R. I. & P. Ry. Co.*, 63 Iowa, 303, 19 N. W. 215, 50 Am. Rep. 746; *Byrne v. Minneapolis & St. L. Ry. Co.*, 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; *Gulf, C. & S. F. Ry. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336; *Galveston, H. & S. A. Ry. Co. v. Parr*, 8 Tex. Civ. App. 280, 28 S. W. 264; *Colorado Consolidated Land & Water Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62; *Chicago & E. R. Co. v. Barnes*, 10 Ind. App. 460, 38 N. E. 428; *Hopkins v. Butte & M. Commercial Co.*, 16 Mont. 356, 40 Pac. 865. See "*Damages*," *Dec. Dig. (Key No.)* §§ 110-112; *Cent. Dig.* §§ 273-283; "*Railroads*," *Cent. Dig.* § 1737.

<sup>43</sup> *Finley v. Hershey*, 41 Iowa, 389. See "*Damages*," *Dec. Dig. (Key No.)* §§ 103, 110-112; *Cent. Dig.* §§ 262, 273-283.

<sup>44</sup> *Jones v. Hannovan*, 55 Mo. 462; *Munroe v. Stickney*, 48 Me. 462; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732. See "*Damages*," *Dec. Dig. (Key No.)* § 12; *Cent. Dig.* § 31; "*Trespass*," *Cent. Dig.* § 141.

of damages.<sup>45</sup> But to this must be added damages for the decreased value of the land during the time the plaintiff was deprived of its full use.<sup>46</sup> By the rule of avoidable consequences<sup>47</sup> the plaintiff can recover such damages for only what would be a reasonable time in which to repair.<sup>48</sup>

### *Consequential Damages*

Consequential damages may also be recovered, in addition to the damages already mentioned, when a proper case is presented. Thus a trespasser who pulled down a fence has been held liable for the value of cattle lost in consequence of the trespass,<sup>49</sup> in addition to the value of the fence. Damages for injured feelings have been recovered in an action in the nature of trespass q. c. f. for the removal of a body from a cemetery lot.<sup>50</sup> A defendant who undermines a store may become liable for a loss of profits caused thereby.<sup>51</sup> And one who destroys a dam may be liable for the loss of profits of a mill run by water supplied from the dam.<sup>52</sup>

<sup>45</sup> *Graessle v. Carpenter*, 70 Iowa, 166, 30 N. W. 392; *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320; *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642; *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027; *Koch v. Sackman-Phillips Inv. Co.*, 9 Wash. 405, 37 Pac. 703. But see *Burtraw v. Clark*, 103 Mich. 383, 61 N. W. 552; *Nelson v. Village of West Duluth*, 55 Minn. 497, 57 N. W. 149. See "Damages," *Dec. Dig. (Key No.)* §§ 110-112; *Cent. Dig.* §§ 273-283.

<sup>46</sup> *Cavannagh v. Durgin*, 156 Mass. 466, 31 N. E. 643; *Walters v. Chamberlin*, 65 Mich. 333, 32 N. W. 440; *Graessle v. Carpenter*, 70 Iowa, 166, 30 N. W. 392. See "Damages," *Dec. Dig. (Key No.)* §§ 110-112; *Cent. Dig.* §§ 273-283.

<sup>47</sup> See ante, p. 87.

<sup>48</sup> *Ludlow v. Village of Yonkers*, 43 Barb. (N. Y.) 493; *Whipple v. Wanskuck Co.*, 12 R. I. 311. See "Damages," *Dec. Dig. (Key No.)* §§ 110-112; *Cent. Dig.* §§ 273-283.

<sup>49</sup> *Damron v. Roach*, 4 Humph. (Tenn.) 134. See "Trespass," *Dec. Dig. (Key No.)* § 47; *Cent. Dig.* § 129.

<sup>50</sup> *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. See "Dead Bodies," *Dec. Dig. (Key No.)* § 9; *Cent. Dig.* §§ 13, 14; "Damages," *Cent. Dig.* §§ 102, 103.

<sup>51</sup> *Shafer v. Wilson*, 44 Md. 268. See "Damages," *Dec. Dig. (Key No.)* §§ 110-112; *Cent. Dig.* §§ 273-283; "Trespass," *Dec. Dig. (Key No.)* § 47; *Cent. Dig.* §§ 128, 129.

<sup>52</sup> *White v. Moseley*, 8 Pick. (Mass.) 356. See "Damages," *Dec. Dig. (Key No.)* §§ 110-112; *Cent. Dig.* §§ 273-283; "Trespass," *Dec. Dig. (Key No.)* § 47; *Cent. Dig.* §§ 128, 129.

*Exemplary Damages and Penalties*

Exemplary damages may also be recovered in an action for injuries to real estate when the trespass causing the damage was wanton or malicious.<sup>53</sup> In some states it has been provided by statute that treble damages shall be recoverable for malicious or willful trespasses.<sup>54</sup>

**SAME—NUISANCE**

**155. For nuisances which are permanent, the measure of damages is the loss in the market value of the premises.**

**156. For nuisances which are not permanent, the ordinary measure of damages is the loss in rental value plus the expenses incurred in abating the nuisance and restoring the premises to their former condition.**

When the nuisance of which the plaintiff complains is one which he cannot abate, and of which the law presumes the continuance,<sup>55</sup> the damage is estimated at the permanent de-

<sup>53</sup> *Cutler v. Smith*, 57 Ill. 252; *Smalley v. Smalley*, 81 Ill. 70; *Western Union Tel. Co. v. Dickens*, 148 Ala. 480, 41 South. 469; *Avera v. Williams*, 81 Miss. 714, 33 South. 501; *Koenigs v. Jung*, 73 Wis. 178, 40 N. W. 801; *Beaudrat v. Southern Ry. Co.*, 69 S. C. 160, 48 S. E. 106; *GILMAN v. BROWN*, 115 Wis. 1, 91 N. W. 227, *Cooley, Cas. Damages*, 268; *Reynolds v. Braithwaite*, 131 Pa. 416, 18 Atl. 1110; *Brown v. Allen*, 35 Iowa, 306; *Craig v. Cook*, 28 Minn. 232, 9 N. W. 712; *Trauerman v. Lippincott*, 39 Mo. App. 478; *United States v. Taylor (C. C.)* 35 Fed. 484. But see *McCormack v. Showalter*, 11 Ind. App. 98, 38 N. E. 875; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. 354. See "*Trespass*," *Dec. Dig. (Key No.)* §§ 56, 60; *Cent. Dig.* §§ 144, 146.

<sup>54</sup> *Reed v. Davis*, 8 Pick. (Mass.) 514; *Michigan Land & Iron Co. v. Deer Lake Co.*, 60 Mich. 143, 27 N. W. 10, 1 Am. St. Rep. 491; *Barnes v. Jones*, 51 Cal. 303. See "*Trespass*," *Dec. Dig. (Key No.)* §§ 60-63; *Cent. Dig.* §§ 146-148.

<sup>55</sup> As when the conduct is authorized on condition that compensation be made for damages, see ante, p. 122. As to special damages, see *Rose v. Miles*, 4 Maule & S. 101; *Booth v. Ratte*, 15 App. Cas. 188. See "*Nuisance*," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

preciation in the market value of the premises.<sup>56</sup> Where the nuisance is of a temporary nature, the wrongful continuance of which will not be presumed, the measure of damages is the actual loss which the plaintiff has sustained up to the time of bringing the action.<sup>57</sup> This is measured, in general, by the loss in the rental value of the premises; that is, the value of the use of the land.<sup>58</sup> To this may be added the expense of restoring the injured premises to the condition in which they were before the nuisance began.<sup>59</sup> If the plaintiff has abated the nuisance, expenses so incurred may be re-

<sup>56</sup> *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241; *Vanderslice v. City of Philadelphia*, 103 Pa. 102; *Fowle v. New Haven & Northampton Co.*, 112 Mass. 334, 17 Am. Rep. 106; *City of Madisonville v. Hardman* (Ky.) 98 S. W. 950; *Bungenstock v. Nishnabotna Drainage Dist.*, 163 Mo. 198, 64 S. W. 149; *Missouri, K. & T. Ry. Co. v. McGhee* (Tex. Civ. App.) 75 S. W. 841; *Finley v. Hershey*, 41 Iowa, 389; *O'Connor v. St. L. K. C. & N. R. Co.*, 56 Iowa, 735, 10 N. W. 263; *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421; *Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. 582. Where the nuisance can be abated, it has been held that there can be no recovery for permanent injuries. *Cumberland & O. Canal Corp. v. Hitchings*, 65 Me. 140; *Hatfield v. Central R. Co.*, 33 N. J. Law, 251; *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190; *Battishill v. Reed*, 18 C. B. 696. And see *Foote v. Burlington Water Co.*, 94 Iowa, 200, 62 N. W. 648. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127; "Damages," *Cent. Dig.* §§ 198, 397.

<sup>57</sup> See ante, p. 115; *Bielman v. Chicago, St. P. & K. C. Ry. Co.*, 50 Mo. App. 151; *Cumberland & O. Canal Corp. v. Hitchings*, 65 Me. 140; *Cleveland, C. & St. L. Ry. Co. v. King*, 23 Ind. App. 573, 55 N. E. 875; *Hale v. Chard Union* [1894] 1 Ch. 293. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>58</sup> *City of Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626; *Holbrook v. Griffiths*, 127 Iowa, 505, 103 N. W. 479; *Swift v. Broyles*, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390; *Francis v. Schoellkopf*, 53 N. Y. 152; *Herbert v. Rainey*, 162 Pa. 525, 29 Atl. 725; *Loughran v. City of Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Gulf, C. & S. F. Ry. Co. v. Helsley*, 62 Tex. 593. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>59</sup> *Jutte v. Hughes*, 67 N. Y. 267; *Emery v. City of Lowell*, 109 Mass. 197. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

covered.<sup>60</sup> Other injuries, indirect, but not too remote, may be compensated in an action for a nuisance. Thus, the profits of an established business may be recovered;<sup>61</sup> damages by sickness including medical expenses<sup>62</sup> and loss of time;<sup>63</sup> and for inconvenience caused by the nuisance.<sup>64</sup>

#### *When Nominal Damages Recoverable*

Annoyance, to constitute a nuisance, must cause substantial damage; for damages are the gist of the wrong, unless there is a physical invasion of or interference with another's property, in which case the presence or absence of actual damage is immaterial.

The creating or continuing of a nuisance in any form, which involves the physical invasion of or interference with another's property, is a wrong for which at least nominal damages may be recovered.<sup>65</sup> Neither absence of actual dam-

<sup>60</sup> *Jutte v. Hughes*, 67 N. Y. 267; *Shaw v. Cumiskey*, 7 Pick. (Mass.) 76. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>61</sup> *St. John v. City of New York*, 13 How. Prac. (N. Y.) 527; *Park v. Chicago & S. W. R. Co.*, 43 Iowa, 636. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>62</sup> *Pierce v. Wagner*, 39 Minn. 355, 13 N. W. 170; *Loughran v. City of Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Gulf, C. & S. F. R. Co. v. Richards*, 11 Tex. Civ. App. 95, 32 S. W. 96. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>63</sup> *Loughran v. City of Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Lockett v. Ft. Worth & R. G. R. Co.*, 78 Tex. 211, 14 S. W. 564. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>64</sup> *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188; *Frick v. Kansas City*, 117 Mo. App. 488, 93 S. W. 351; *Rosenheimer v. Standard Gas Light Co.*, 36 App. Div. 1, 65 N. Y. Supp. 192; *Churchill v. Burlington Water Co.*, 94 Iowa, 89, 62 N. W. 646; *Randolf v. Town of Bloomfield*, 77 Iowa, 50, 41 N. W. 562, 14 Am. St. Rep. 268; *Berger v. Minneapolis Gaslight Co.*, 59 Minn. 296, 62 N. W. 336; *Columbus, H. V. & T. R. Co. v. Gardner*, 45 Ohio St. 309, 13 N. E. 69; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739. But cf. *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>65</sup> *Alexander v. Kerr*, 2 Rawle (Pa.) 83, 19 Am. Dec. 616; *Farley*

ages, nor even benefit from the nuisance,<sup>66</sup> nor abatement, will prevent such recovery.<sup>67</sup> Thus the overhanging of another's land is a nuisance, for which an action will lie without allegation or proof of actual damages.<sup>68</sup> So, to cause water to flow wrongfully upon another's land in such a way that its continuance would create an easement is sufficient to justify an injunction, irrespective of damages.<sup>69</sup>

But when the act complained of is lawful in itself, and actionable only because of harmful consequences, a different rule prevails. Then it is only when some actual damage is done that a right of action ensues. The damage must be substantial. "Everything must be looked at from a reasonable point of view. The law does not regard a trifling inconvenience, but only large, sensible inconveniences and injuries, which sensibly diminish the comfort, enjoyment, or value of the property which they affect."<sup>70</sup>

v. Gate City Gas Light Co., 105 Ga. 323, 31 S. E. 193; Munroe v. Stickney, 48 Me. 462. And see Perry v. Howe Co-Op. Creamery Co., 125 Iowa, 415, 101 N. W. 150. See "Damages," *Dec. Dig. (Key No.)* § 12; "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* § 118.

<sup>66</sup> Francis v. Schoellkopf, 53 N. Y. 152; Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181; Kimel v. Kimel, 49 N. C. 121; Marcy v. Fries, 18 Kan. 353. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>67</sup> Call v. Buttrick, 4 Cush. (Mass.) 345; Gleason v. Gary, 4 Conn. 418. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>68</sup> Bellows v. Sackett, 15 Barb. (N. Y.) 96; Codman v. Evans, 7 Allen (Mass.) 431; Tucker v. Newman, 11 Adol. & E. 40. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>69</sup> Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11, and cases cited. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

<sup>70</sup> 2 Jag. Torts, 778; Pickard v. Collins, 23 Barb. (N. Y.) 444; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221; Barnes v. Hathorn, 54 Me. 124; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642. See "Nuisance," *Dec. Dig. (Key No.)* § 50; *Cent. Dig.* §§ 118-127.

**SAME—WASTE**

**157. The measure of damages for waste is the diminution in the market value of the inheritance.**

**158. In many states double or treble damages for waste are imposed by statute.**

The measure of damages for waste committed by the owner of a particular estate is the diminution in the value of the estate in reversion or remainder.<sup>71</sup> Where waste has been committed by removing fixtures, or cutting trees, the recovery is not limited to the value of fixtures, or of the trees after severance.<sup>72</sup>

By the statute of Gloucester<sup>73</sup> a penalty of treble damages was imposed in certain cases of waste. This statute is in force in some states.<sup>74</sup> In others there are similar statutes, giving double or treble damages, and usually imposing an additional penalty of forfeiture of the place wasted.<sup>75</sup>

<sup>71</sup> *Van Deusen v. Young*, 29 N. Y. 9; *Staudenwire v. De Bardeleben*, 85 Ala. 85, 4 South. 723; *Tate v. Field*, 57 N. J. Eq. 53, 40 Atl. 206, affirmed in 57 N. J. Eq. 632, 42 Atl. 742; *Cole v. Bickelhaupt*, 64 App. Div. 6, 71 N. Y. Supp. 636; *Harder v. Harder*, 26 Barb. (N. Y.) 409; *White v. Stoner*, 18 Mo. App. 540. For waste by a vendor, see *Worrall v. Munn*, 53 N. Y. 185. See "*Waste*," *Dec. Dig. (Key No.)* § 18; *Cent. Dig.* §§ 44, 45.

<sup>72</sup> *White v. Stoner*, 18 Mo. App. 540; *Morris v. Knight*, 14 Pa. Super. Ct. 324; *Hosking v. Phillips*, 3 Exch. 166. See "*Waste*," *Dec. Dig. (Key No.)* § 18; *Cent. Dig.* §§ 44, 45.

<sup>73</sup> 6 Edw. I. c. 5.

<sup>74</sup> *Sackett v. Sackett*, 8 Pick. (Mass.) 309; *Isom v. Book*, 142 Cal. 666, 76 Pac. 506. See 3 Bin. (Pa.) Append. 602. See "*Waste*," *Dec. Dig. (Key No.)* § 18; *Cent. Dig.* §§ 44, 45.

<sup>75</sup> New York, 4 Rev. St. 1883, § 1656; Michigan, How. Ann. St. 1883, § 7945; Wisconsin, Sanb. & B. Ann. St. 1889, § 3176; Iowa, McClain's Ann. Code 1888, §§ 4568, 4569; Minnesota, St. 1894, §§ 5882, 5883; Missouri, 2 Rev. St. 1889, § 6401; Massachusetts, Pub. St. 1882, p. 1038, c. 179; Indiana, Rev. St. 1894, § 287 (Rev. St. 1881 § 286); Kentucky, Gen. St. 1894, § 2328.

**CONTRACTS TO SELL REAL PROPERTY—BREACH  
BY VENDOR**

**159.** The proper measure of damages for the breach by a vendor of his contract to sell real property is the difference between the contract price and the market value of the land at the time of the breach, plus any part of the purchase price which has been paid, with interest.

**EXCEPTION**—In some states the vendee can recover, in addition to purchase money advanced, with interest, only nominal damages for a breach of the contract due to failure of the vendor's title, provided the vendor acted in good faith. In Pennsylvania, the good faith of the vendor is immaterial.

*The Better Rule*

In most American states a vendee can recover substantial damages for his vendor's breach of contract to convey real property; that is, the vendee is given the benefit of his bargain.<sup>76</sup> This is of particular importance when the property has risen in value after the contract of sale was entered

<sup>76</sup> *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218; *Sprague v. Griffin*, 22 App. Div. 223, 47 N. Y. Supp. 857; *Hoback v. Kilgores*, 28 Grat. (Va.) 442, 21 Am. Rep. 317; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Loomis v. Wadhams*, 8 Gray (Mass.) 557; *Brigham v. Evans*, 113 Mass. 538; *Muenchow v. Roberts*, 77 Wis. 520, 46 N. W. 802; *Skaaraas v. Finnegan*, 31 Minn. 48, 16 N. W. 456; *Shaw v. Wilkins' Adm'r*, 8 Humph. (Tenn.) 647, 49 Am. Dec. 692; *Case v. Wolcott*, 33 Ind. 5; *Duncan v. Tanner*, 2 J. J. Marsh. (Ky.) 399; *Robinson v. Heard*, 15 Me. 296; *Whiteside v. Jennings*, 19 Ala. 784; *Wells v. Abernethy*, 5 Conn. 222; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Irwin v. Askew*, 74 Ga. 581; *Nichols v. Freeman*, 33 N. C. 99; *Barbour v. Nichols*, 3 R. I. 187; *Cade v. Brown*, 1 Wash. 401, 25 Pac. 457; *Dunshee v. Geoghegan*, 7 Utah, 113, 25 Pac. 731; *Russ v. Telfener* (C. C.) 57 Fed. 973. But see *Stuart v. Pennis*, 100 Va. 612, 42 S. E. 667. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 351; *Cent. Dig.* §§ 1047-1058.



into.<sup>77</sup> The value of the land in estimating the damages is taken at the time it should have been conveyed under the contract.<sup>78</sup>

*Nominal Damages Only—The English Rule*

In England an anomalous rule of damages has been adopted in actions against vendors for breach of contracts to sell real property. The leading cases establishing the rule in that country are *Flureau v. Thornhill*<sup>79</sup> and *Bain v. Fothergill*.<sup>80</sup>

<sup>77</sup> *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 351; *Cent. Dig.* §§ 1047-1058.

<sup>78</sup> *Allen v. Atkinson*, 21 Mich. 351; *Dody v. Condit*, 188 Ill. 234, 53 N. E. 900; *Stewart v. McLaughlin's Estate*, 126 Mich. 1, 85 N. W. 266, 87 N. W. 218; *Nolde v. Gray*, 73 Neb. 373, 102 N. W. 759, 104 N. W. 165; *Goodman v. Wolf*, 95 App. Div. 522, 88 N. Y. Supp. 934; *Jennings v. Oregon Land Co.*, 48 Or. 287, 86 Pac. 367; *NEPPACH v. OREGON & C. R. CO.*, 46 Or. 374, 80 Pac. 482; *Cooley, Cas. Damages*, 270; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *White-side v. Jennings*, 19 Ala. 784. That the necessary expense incurred by the plaintiff in searching the title may be recovered, see *Cal. Civ. Code*, § 3306. And cf. *Sanderlin v. Willis*, 94 Ga. 171, 21 S. E. 291. For cases of failure of the title to part of the land, see *Hiner v. Richter*, 51 Ill. 299; *Moses v. Wallace*, 7 Lea (Tenn.) 413; *Walker v. France*, 112 Pa. 203, 5 Atl. 208. For breach of a contract to give a lease, the measure of damages is the value of the lease; that is, the difference between the value of the premises for the term and the rent which was to be paid. *Loyd v. Capps* (Tex. Civ. App.) 29 S. W. 505; *Paposkey v. Munkwitz*, 68 Wis. 323, 32 N. W. 35, 60 Am. Rep. 858; *Trull v. Granger*, 8 N. Y. 115; *Knowles v. Steele*, 59 Minn. 452, 61 N. W. 557. Expenses necessarily caused by the lessor's breach may be added. *Yeager v. Weaver*, 64 Pa. 425. But see, for expenses not recoverable, *Eddy v. Coffin*, 149 Mass. 463, 21 N. E. 870, 14 Am. St. Rep. 441; *Cohn v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 351; *Cent. Dig.* §§ 1047-1058.

<sup>79</sup> 2 W. Bl. 1078. But compare *Hopkins v. Grazebrook*, 6 Barn. & C. 31.

<sup>80</sup> L. R. 7 H. L. 158. It was said by Parke, B., in *Robinson v. Harman*, 1 Exch. 850, that "contracts for the sale of real estate are merely on condition that the vendor has a good title, so that, when a person contracts to sell real property, there is an implied undertaking that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title."

The uncertainty of English titles is assigned as the reason for the rule, but such considerations have no place under our registry laws. The English rule has been followed, however, in some states. In Pennsylvania this is carried so far that only nominal damages are recoverable even in cases where the vendor knew that his title was not good.<sup>81</sup> But in the other states which follow the English rule it is necessary that the vendor act in good faith or he is held liable for substantial damages.<sup>82</sup> So, where the title was in a third person, a vendor has been held liable beyond nominal damages, even though the vendor reasonably believed that he could procure a conveyance of the title of the owner.<sup>83</sup>

*Fraudulent Representations by Vendor*

Where a vendor makes fraudulent statements, in order to induce a vendee to purchase land, as to the quantity, boundaries, or condition and improvements of the land contracted to be sold, the measure of damages is the difference between the value of the land as it is and its value if it had been as represented.<sup>84</sup>

<sup>81</sup> *Burk v. Serrill*, 80 Pa. 413, 21 Am. Rep. 105; *McCafferty v. Griswold*, 99 Pa. 376; *McNair v. Compton*, 35 Pa. 23. But see *Hennershotz v. Gallagher*, 124 Pa. 1, 18 Atl. 518. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 351; *Cent. Dig.* §§ 1047-1058.

<sup>82</sup> *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463; *Conger v. Weaver*, 20 N. Y. 140; *Margraf v. Muir*, 57 N. Y. 155; *Walton v. Meeks*, 120 N. Y. 79, 23 N. E. 1115; *Rineer v. Collins*, 156 Pa. 343, 27 Atl. 28; *Hammond v. Hamin*, 21 Mich. 374, 4 Am. Rep. 490; *Donner v. Redenbaugh*, 61 Iowa, 269, 16 N. W. 127; *Yokom v. McBride*, 56 Iowa, 139, 8 N. W. 795; *Dunnica v. Sharp*, 7 Mo. 71; *Herndon v. Venable*, 7 Dana (Ky.) 371; *Baltimore Permanent Bldg. & Land Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Sanford v. Cloud*, 17 Fla. 532; *Tracy v. Gunn*, 29 Kan. 508. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 351; *Cent. Dig.* §§ 1047-1058.

<sup>83</sup> *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463; *Heimbürg v. Ismay*, 35 N. Y. Super. Ct. 35. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 351; *Cent. Dig.* §§ 1047-1058.

<sup>84</sup> *Drew v. Beall*, 62 Ill. 164; *Krumm v. Beach*, 96 N. Y. 398; *Page v. Wells*, 37 Mich. 415; *Gates v. Reynolds*, 13 Iowa, 1; *Hahn v. Cummings*, 3 Iowa, 583. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 351; *Cent. Dig.* §§ 1047-1058.

**SAME—BREACH BY VENDEE**

**160. The measure of damages for the breach by a vendee of his contract to purchase real property is the difference between the contract price and the value of the land.**

When a purchaser of real property fails to carry out his contract, the vendor can recover such an amount as damages as will make him whole. If the land was worth less than he sold it for, or if it depreciated in value between the time the contract was made and its breach by the vendee, the vendor can recover the difference in value of the land and what the vendee agreed to pay for it.<sup>85</sup> In some cases the vendor has been permitted to recover the contract price,<sup>86</sup> but this gives him more than compensation, since he still has the land. Where the vendee has been in possession, interest on the whole amount of purchase money unpaid has been allowed as additional damages.<sup>87</sup>

<sup>85</sup> *Allen v. Mohn*, 86 Mich. 328, 49 N. W. 52, 24 Am. St. Rep. 126; *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394; *Brooks v. Miller*, 103 Ga. 712, 30 S. E. 630; *Goodwine v. Kelley*, 33 Ind. App. 57, 70 N. E. 832; *Prichard v. Mulhall*, 127 Iowa, 545, 103 N. W. 774; *Harmon v. Thompson*, 119 Ky. 528, 84 S. W. 569; *Ellet v. Paxson*, 2 Watts & S. (Pa.) 418; *Griswold v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76; *Porter v. Travis*, 40 Ind. 556; *Anderson v. Truitt*, 53 Mo. App. 590; *HOGAN v. KYLE*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910, *Cooley, Cas. Damages*, 272; *Laird v. Pirn*, 7 Mees. & W. 474. But see *McGuinness v. Whalen*, 16 R. I. 558, 18 Atl. 158, 27 Am. St. Rep. 763. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 330; *Cent. Dig.* §§ 953-956.

<sup>86</sup> *Richards v. Edrick*, 17 Barb. (N. Y.) 260; *Goodpaster v. Porter*, 11 Iowa, 161; *Inhabitants of Alma v. Plummer*, 4 Me. 258. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 330; *Cent. Dig.* §§ 953-956.

<sup>87</sup> *Stevenson v. Maxwell*, 2 N. Y. 408; *Fludyer v. Cocker*, 12 Ves. 25. See "*Vendor and Purchaser*," *Dec. Dig. (Key No.)* § 330; *Cent. Dig.* §§ 953-956.

### BREACH OF COVENANTS—SEISIN AND RIGHT TO CONVEY

**161. The measure of damages for breach of a covenant of seisin or right to convey is the purchase price paid, with interest, and costs of the ejectment suit.**

For the breach of covenants of title, the rules of damages are anomalous. They can be explained only through the feudal origin of the covenants themselves. The rules as they are in force in most of the states operate to restore the parties to the position they were in before any contract was made, and not to give such damages as would place the covenantee in as good a position as though the contract made by the covenantor had been performed.

The covenants of seisin and of right to convey are the same, so far, at least, as the measure of damages for their breach is concerned. The covenantee does not get the benefit of his bargain, as he should, but only recovers what he has paid for the land.<sup>88</sup> If the eviction is only partial, a proportionate amount of the consideration paid is recovered.<sup>89</sup> If

<sup>88</sup> *Weber v. Anderson*, 73 Ill. 439; *Conklin v. Hancock*, 67 Ohio St. 455, 66 N. E. 518; *Bingham v. Weiderwax*, 1 N. Y. 509; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; *Staats v. Ten Eyck's Heirs*, 3 Caines (N. Y.) 111, 3 Am. Dec. 254; *Nichols v. Walter*, 8 Mass. 243; *Hodges v. Thayer*, 110 Mass. 286; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405; *Kimball v. Bryant*, 25 Minn. 496; *Montgomery v. Reed*, 69 Me. 510; *Martin v. Long*, 3 Mo. 391. But see *Smith v. Strong*, 14 Pick. (Mass.) 128, a case where the consideration paid could not be proved. The consideration expressed in the deed cannot be questioned, especially when the title fails in the hands of an assignee. *Greenvault v. Davis*, 4 Hill (N. Y.) 643. See "Covenants," *Dec. Dig. (Key No.)* §§ 125, 126; *Cent. Dig.* §§ 231-237.

<sup>89</sup> *Tone v. Wilson*, 81 Ill. 529; *Bolinger v. Brake*, 57 Kan. 663, 47 Pac. 537; *Conklin v. Hancock*, 67 Ohio St. 455, 66 N. E. 518; *Phillips v. Reichert*, 17 Ind. 120, 79 Am. Dec. 463; *Guthrie v. Pugsley*, 13 Johns. (N. Y.) 126; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405; *Bibb v. Freeman*,

there has been no eviction, only nominal damages can be recovered.<sup>90</sup> Interest on the purchase price, or any part of it, which has been paid, may be recovered as a part of the damages.<sup>91</sup> When the covenantee has defended an ejectment suit brought by the rightful owner, and has been defeated, he may recover from the covenantor the costs of the suit.<sup>92</sup> In most states this includes counsel fees,<sup>93</sup> but not in all.<sup>94</sup>

<sup>89</sup> Ala. 612. Cf. *Hartford & Salisbury Ore Co. v. Miller*, 41 Conn. 112. See "Covenants," *Dec. Dig. (Key No.)* §§ 125, 126; *Cent. Dig.* §§ 231-237.

<sup>90</sup> *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653; *Cockrell v. Proctor*, 65 Mo. 41; *Norman v. Winch*, 65 Iowa, 263, 21 N. W. 598; *Mumford v. Keet*, 65 Mo. App. 502. Nominal damages only may be recovered where, before injury is sustained, the paramount title is perfected in the covenantor, and by inurement vests in the grantee. *Building, Light & Water Co. v. Fray*, 96 Va. 559, 32 S. E. 58. See "Covenants," *Dec. Dig. (Key No.)* §§ 125, 126; *Cent. Dig.* §§ 231-237.

<sup>91</sup> *Brickford v. Page*, 2 Mass. 455; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Smith v. Strong*, 14 Pick. (Mass.) 128; *Martin v. Long*, 3 Mo. 391; *Lawless v. Collier's Ex'rs*, 19 Mo. 480; *Brandt v. Foster*, 5 Iowa, 289. See "Covenants," *Dec. Dig. (Key No.)* §§ 125, 126; *Cent. Dig.* §§ 231-237.

<sup>92</sup> *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Rook v. Rook*, 111 Ill. App. 398; *Webb v. Halt*, 113 Mich. 338, 71 N. W. 637; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416; *Staats v. Ten Eyck*, 3 Caines (N. Y.) 111, 2 Am. Dec. 254. See "Covenants," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 260-262.

<sup>93</sup> *Staats v. Ten Eyck*, 3 Caines (N. Y.) 111, 2 Am. Dec. 254; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416; *Ryerson v. Chapman*, 66 Me. 557; *Coleman v. Clark*, 80 Mo. App. 339; *Seitz v. Peoples' Sav. Bank*, 140 Mich. 106, 103 N. W. 545. But see *Wiggins v. Pender*, 132 N. C. 628, 44 S. E. 362, 61 L. R. A. 772; *Cullity v. Dorffiel*, 18 Wash. 122, 50 Pac. 932. See "Covenants," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 260-262.

<sup>94</sup> *Williams v. Burg*, 9 Lea (Tenn.) 455; *Jeter v. Glenn*, 9 Rich. (S. C.) 374; *Turner v. Miller*, 42 Tex. 418, 19 Am. Rep. 47. See "Covenants," *Dec. Dig. (Key No.)* § 132; *Cent. Dig.* §§ 260-262.

**SAME—WARRANTY AND QUIET ENJOYMENT**

**162.** The measure of damages for breach of a covenant of warranty or quiet enjoyment is in most states the purchase price paid, with interest, for the time the covenantee is liable for mesne profits, plus the costs of any suit brought to try the title.

**EXCEPTION**—In a few states the measure of damages for breach of these covenants is the value of the land at the time of eviction.

*The Consideration as the Measure*

In nearly all the states the damages which are given on covenants of warranty and quiet enjoyment are based on the old feudal doctrine of warranty, and the value of the land at the time of the covenant is made the measure. But the value of the land is taken at the price which was paid for it. Though this may be contrary to all the fundamental principles of damages, it is certainly the rule in the great majority of states.<sup>95</sup> Under this rule a covenantee who is evicted by

<sup>95</sup> *Herington v. Clark*, 60 Kan. 855, 55 Pac. 462; *Parkinson v. Woulds*, 125 Mich. 325, 84 N. W. 292; *Leet v. Gratz*, 92 Mo. App. 422; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455; *Staats v. Ten Eyck*, 3 Caines (N. Y.) 111, 2 Am. Dec. 254; *Harding v. Larkin*, 41 Ill. 413; *Devine v. Lewis*, 38 Minn. 24, 35 N. W. 711; *Brandt v. Foster*, 5 Iowa, 287; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284; *Alvord v. Waggoner* (Tex. Civ. App.) 29 S. W. 797; *Rash v. Jenne*, 26 Or. 169, 37 Pac. 538. But see *Brooks v. Black*, 68 Miss. 161, 8 South. 332, 11 L. R. A. 176, 24 Am. St. Rep. 259; *Taylor v. Wallace*, 20 Colo. 211, 37 Pac. 963. When grantee buys in the paramount title, he may recover only what he paid therefor up to the limit of the consideration named in the deed. *Richards v. Iowa Homestead Co.*, 44 Iowa, 304, 24 Am. Rep. 745. To same effect, see *McGarz v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456. If the grantee perfected the title without notice to his grantor, he could recover only the price paid for that purpose and such other damages as he had sustained. *Holloway v. Miller*, 84 Miss. 776, 36 South. 531. See "Covenants," *Dec. Dig. (Key No.)* § 128; *Cent. Dig.* §§ 243, 255, 256.

one having a superior title cannot recover from his warrantor for improvements which he has erected on the land<sup>96</sup> though, as has been seen, the value of such improvements is deducted from the mesne profits, which are recovered by the real owner.<sup>97</sup> Whenever the covenantee is liable for mesne profits, he can recover interest on the consideration paid for the same length of time that he is so liable for the mesne profits.<sup>98</sup> There may be a recovery, also, as part of the damages, of the costs of any suits brought or defended in settling the title to the land,<sup>99</sup> provided the costs were incurred in good faith.<sup>100</sup> Costs may include attorney's fees.<sup>101</sup>

*The Value at Eviction as the Measure*

In Massachusetts and a few other states the measure of damages awarded on the breach of covenants of warranty and quiet enjoyment is the value of the land at the time of the eviction.<sup>102</sup> This, of course, includes improvements.<sup>103</sup>

<sup>96</sup> *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; *Hunt v. Raplee*, 44 Hun (N. Y.) 149. But see *Ela v. Card*, 2 N. H. 175, 9 Am. Dec. 46. See "Covenants," *Dec. Dig. (Key No.)* § 128; *Cent. Dig.* §§ 243, 255, 256.

<sup>97</sup> Ante, p. 495.

<sup>98</sup> *Cox's Adm'r's v. Henry*, 32 Pa. 18; *Hutchins v. Roundtree*, 77 Mo. 500. See "Covenants," *Dec. Dig. (Key No.)* § 128; *Cent. Dig.* §§ 243, 255, 256.

<sup>99</sup> *Bennet v. Jenkins*, 13 Johns. (N. Y.) 50; *Swartz v. Ballou*, 47 Iowa, 188, 39 Am. Rep. 470. See "Covenants," *Dec. Dig. (Key No.)* § 128; *Cent. Dig.* §§ 243, 255, 256.

<sup>100</sup> *Ryerson v. Chapman*, 66 Me. 557. See "Covenants," *Dec. Dig. (Key No.)* § 128; *Cent. Dig.* §§ 243, 255, 256.

<sup>101</sup> *Harding v. Larkin*, 41 Ill. 413; *Swartz v. Ballou*, 47 Iowa, 188, 39 Am. Rep. 470; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416; *Meservey v. Snell*, 94 Iowa, 222, 62 N. W. 767, 58 Am. St. Rep. 391. Contra, *Leffingwell v. Elliott*, 10 Pick. (Mass.) 204; *Turner v. Miller*, 42 Tex. 419, 19 Am. Rep. 47. See "Covenants," *Dec. Dig. (Key No.)* § 128; *Cent. Dig.* §§ 243, 255, 256.

<sup>102</sup> *Norton v. Babcock*, 2 Metc. (Mass.) 510; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Hardy v. Nelson*, 27 Me. 525; *Keeler v. Wood*, 30 Vt. 242; *Sterling v. Peet*, 14 Conn. 245. See "Covenants" *Dec. Dig. (Key No.)* §§ 128, 130; *Cent. Dig.* §§ 243-255.

<sup>103</sup> *Coleman v. Ballard's Heirs*, 13 La. Ann. 512; *Bunny v. Hopkinson*, 27 Beav. 565. See "Covenants," *Dec. Dig. (Key No.)* §§ 128, 130; *Cent. Dig.* §§ 243-255.

**SAME—AGAINST INCUMBRANCES**

163. The measure of damages for breach of a covenant against incumbrances is:

- (a) For a permanent incumbrance, the diminution in the value of the premises due to the incumbrance—not exceeding, in most states, the consideration paid; in others, not exceeding the value of the land.
- (b) For incumbrance which causes a total eviction, the consideration with interest and costs in most states, or the value of the land with interest in others; for a partial eviction, a proportionate amount.
- (c) For a removable incumbrance, the reasonable expense of removing it, not exceeding the consideration or the value of the land.

*Permanent Incumbrances*

When a grantor has conveyed with a covenant against incumbrances, and it turns out that there is a permanent incumbrance on the land, such as a right of way or other easement, the grantee is entitled to such a sum as will compensate him for the decreased value of the land, regarded as a permanent injury.<sup>104</sup> The amount recoverable is limited, however, by the sum which could be recovered for a total loss of the land.<sup>105</sup>

<sup>104</sup> *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Harrington v. Bean*, 89 Me. 470, 36 Atl. 986; *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 76 N. E. 449, 3 L. R. A. (N. S.) 98, 112 Am. St. Rep. 296; *Whiteside v. Magruder*, 75 Mo. App. 364; *Herb v. Metropolitan Hospital & Dispensary*, 80 App. Div. 145, 80 N. Y. Supp. 552; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. 702; *Kellogg v. Malin*, 62 Mo. 429; *Mitchell v. Stanley*, 44 Conn. 312. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.

<sup>105</sup> *Clark v. Zeigler*, 79 Ala. 346; *Koestenbader v. Peirce*, 41 Iowa, 204. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.



*Eviction Total or Partial*

An incumbrance may be such that it causes the eviction of the covenantee. In such case the amount of recovery is measured by the same rules as a recovery on the breach of a covenant of warranty, and the same conflict in the cases exists.<sup>106</sup> The measure of damages is either the consideration paid, with interest and costs,<sup>107</sup> or the value of the land, with interest from the time of eviction.<sup>108</sup> When the eviction is temporary only, as by an outstanding term of years or a dower interest, the measure of damages is the value of the outstanding interest.<sup>109</sup> For a partial eviction, the damages recoverable are proportioned to the value or price of the part lost, not exceeding, of course, the amount which could be recovered for a total eviction.<sup>110</sup>

*Removable Incumbrances*

Where incumbrances exist, such as mortgages, which can be removed by the payment of money, the expense of removing the incumbrance is the measure of the covenantee's damage;<sup>111</sup> but this must not exceed the price or value of the

<sup>106</sup> See ante, p. 515.

<sup>107</sup> *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863; *Patterson v. Stewart*, 6 Watts & S. (Pa.) 527, 40 Am. Dec. 586; *Stewart v. Drake*, 9 N. J. Law, 139; *McGuffey v. Humes*, 85 Tenn. 26, 1 S. W. 506; *Jenkins v. Jones*, 9 Q. B. Div. 128. But see *Loiseau v. Threlstad*, 14 S. D. 257, 85 N. W. 189. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.

<sup>108</sup> *Barrett v. Porter*, 14 Mass. 143; *Horsford v. Wright, Kirby* (Conn.), 3, 1 Am. Dec. 8. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.

<sup>109</sup> *Rickert v. Snyder*, 9 Wend. (N. Y.) 416; *Terry's Ex'r v. Drabenstadt*, 68 Pa. 400; *Tierney v. Whiting*, 2 Colo. 620. But see *Harrington v. Murphy*, 109 Mass. 299. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.

<sup>110</sup> *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Wright v. Nipple*, 92 Ind. 310. See, also, *Loiseau v. Threlstad*, 14 S. D. 257, 85 N. W. 189. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.

<sup>111</sup> *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246; *Donahoe v. Emery*, 9 Metc. (Mass.) 63; *Winslow v. McCall*, 32 Barb. (N. Y.) 241; *Hall v. Dean*, 13 Johns. (N. Y.) 105; *Hurd v. Hall*, 12 Wis.

land as the case may be.<sup>112</sup> The covenantee must not pay more than is necessary in removing the incumbrance.<sup>113</sup> If he does not extinguish the incumbrance, he can recover only nominal damages, as he may never be disturbed by it.<sup>114</sup>

#### 164. SAME—COVENANTS IN LEASES

When any of the foregoing covenants occur in leases, the same rules govern the damages for their breach as when they are found in deeds.<sup>115</sup> The other covenants usually inserted in leases are mere contracts, for the breach of which the principles of damages have already been discussed.<sup>116</sup> For breach of a contract to give a lease, the measure of damages is the value of the lease; that is to say, the difference between

<sup>112</sup> Ward v. Ashbrook, 78 Mo. 515; Dillahunt v. Little Rock & Ft. S. Ry. Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.

<sup>113</sup> Johnson v. Collins, 116 Mass. 392; Guthrie v. Russell, 46 Iowa, 269; Grant v. Tallman, 20 N. Y. 191, 75 Am. Dec. 384; Bailey v. Scott, 13 Wis. 618. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.

<sup>114</sup> Bradshaw v. Crosby, 151 Mass. 237, 24 N. E. 47; Coburn v. Litchfield, 132 Mass. 449. For breach of covenants to remove incumbrances, see Somers v. Wright, 115 Mass. 292. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.

<sup>115</sup> Delavergue v. Norris, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281. See, also, McGuckin v. Milbank, 83 Hun, 473, 3 N. Y. Supp. 1049; Tufts v. Adams, 8 Pick. (Mass.) 547; Norton v. Colgrove, 41 Mich. 544, 3 N. W. 159; Lane v. Richardson, 104 N. C. 642, 10 S. E. 189. See "Covenants," *Dec. Dig. (Key No.)* § 127; *Cent. Dig.* §§ 238-242.

<sup>116</sup> Dobbins v. Duquid, 65 Ill. 464; Sheets v. Joyner, 11 Ind. App. 205, 38 N. E. 830; Clark v. Fisher, 54 Kan. 403, 38 Pac. 493; Wetzel v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004; Hodges v. Fries, 34 Fla. 63, 15 South. 682. See "Landlord and Tenant," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* §§ 469, 479.

<sup>117</sup> See Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369; Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7; United States Trust Co. v. O'Brien, 143 N. Y. 284, 38 N. E. 266; Gulliver v. Fowler, 64 Conn. 556, 30 Atl. 852; Trinity Church v. Higgins, 48 N. Y. 532; B. F. Myers Tailoring Co. v. Keeley, 58 Mo. App. 491; McHenry v. Marr, 39 Md. 510. See "Landlord and Tenant," *Dec. Dig. (Key No.)* § 130; *Cent. Dig.* § 479.

the value of the premises for the term and the rent which was to be paid.<sup>117</sup> On the breach of a tenant's covenant to lease, the damages are measured by the difference between the rent reserved and the rent actually received from others.<sup>118</sup>

The measure of damages for breach of a covenant to repair is the cost of making the repairs,<sup>119</sup> and the loss of the use of the premises due to the failure to repair.<sup>120</sup>

If there is a breach of the covenant to surrender the premises in good condition, the measure of damages is the cost of putting the premises in condition, allowing for reasonable wear and use.<sup>121</sup> And where the tenant's breach of the covenant to allow a "To Let" sign to be posted on the premises resulted in the loss of several months' rent, the damages were so measured.<sup>122</sup>

<sup>117</sup> *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858; *Knowles v. Steele*, 59 Minn. 452, 61 N. W. 557; *Trull v. Granger*, 8 N. Y. 115. See "*Landlord and Tenant*," *Dec. Dig. (Key No.)* § 22; *Cent. Dig.* § 59.

<sup>118</sup> *Massie v. State Nat. Bank*, 11 Tex. Civ. App. 280, 32 S. W. 797. See "*Landlord and Tenant*," *Dec. Dig. (Key No.)* § 22; *Cent. Dig.* § 59.

<sup>119</sup> *Fisher v. Goebel*, 40 Mo. 475. See "*Landlord and Tenant*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* § 563.

<sup>120</sup> *Myers v. Burns*, 35 N. Y. 269; *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. 246. See, also, *Raynor v. Valentin Blatz Brewing Co.*, 100 Wis. 414, 76 N. W. 343. See "*Landlord and Tenant*," *Dec. Dig. (Key No.)* § 154; *Cent. Dig.* § 563.

<sup>121</sup> *Watriss v. First Nat. Bank of Cambridge*, 130 Mass. 343. See "*Landlord and Tenant*," *Dec. Dig. (Key No.)* § 160; *Cent. Dig.* § 625.

<sup>122</sup> *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 38 N. E. 266. See "*Landlord and Tenant*," *Dec. Dig. (Key No.)* § 49; *Cent. Dig.* §§ 117-119.

## CHAPTER XIV

## BREACH OF MARRIAGE PROMISE

- 165. In General.
- 166. Compensatory Damages.
- 167. Exemplary Damages.

## IN GENERAL

**165. Damages for breach of promise of marriage are both:**

- (a) Compensatory, and**
- (b) Exemplary.**

Actions for breach of promise of marriage are peculiar in many respects. The action is nominally for a breach of contract, but the measure of damages is fixed by rules which do not apply to other actions of contract. They are awarded upon principles more commonly applicable in actions of tort.<sup>1</sup> "Damages in this action have never been limited to the simple rule governing actions upon simple contracts for the payment of money."<sup>2</sup> Compensation for mental suffering<sup>3</sup> and exemplary damages are recoverable. These striking differences grow out of the nature of the consequences of a breach. In most ordinary contracts, the damages are wholly pecuniary, and as has been seen, are governed by definite rules. But, in

<sup>1</sup> *Sherman v. Rawson*, 102 Mass. 395. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* §§ 25, 26; *Cent. Dig.* §§ 38, 39.

<sup>2</sup> *Thorn v. Knapp*, 42 N. Y. 474, 483, 1 Am. Rep. 561. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* §§ 25, 26; *Cent. Dig.* §§ 38, 39.

<sup>3</sup> *Wells v. Padgett*, 8 Barb. (N. Y.) 323; *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Tyler v. Salley*, 82 Me. 128, 19 Atl. 107; *Wilbur v. Johnson*, 58 Mo. 600; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 26; *Cent. Dig.* §§ 38, 39.

case of a breach of promise of marriage, perhaps the principal damage is nonpecuniary. Such a wrong is peculiarly apt to cause mental suffering. In other respects, also, the damages are very much at large. The result has been that, as in most torts, the damages are very much within the sound discretion of a jury.

### COMPENSATORY DAMAGES

**166. Compensation may be recovered for all the natural and probable consequences of the breach, including both:**

- (a) Pecuniary losses, and**
- (b) Nonpecuniary losses.**

#### *Pecuniary Losses*

As in other cases, compensation may be recovered for pecuniary losses proximately caused. This includes the money value or worldly advantage of a marriage which would have given plaintiff a permanent home and an advantageous establishment,<sup>4</sup> and in this connection plaintiff's lack of property may be shown.<sup>5</sup> Evidence of defendant's financial and social position is therefore admissible.<sup>6</sup> The plaintiff is entitled to

<sup>4</sup> *Coolidge v. Neat*, 129 Mass. 146; *Grant v. Wiley*, 101 Mass. 356; *Harrison v. Swift*, 13 Allen (Mass.) 144; *Geiger v. Payne*, 103 Iowa, 581, 69 N. W. 554, 71 N. W. 571. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* §§ 25, 26; *Cent. Dig.* §§ 38, 39.

<sup>5</sup> *Vanderpool v. Richardson*, 52 Mich. 336, 17 N. W. 936. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 27; *Cent. Dig.* §§ 38, 39.

<sup>6</sup> *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; *Humphrey v. Brown* (C. C.) 89 Fed. 640; *Birum v. Johnson*, 87 Minn. 362, 92 N. W. 1; *Jacoby v. Stark*, 205 Ill. 34, 68 N. E. 557; *Berry v. Da Costa*, L. R. 1 C. P. 331; *Miller v. Rosier*, 31 Mich. 475; *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. 321; *Rutter v. Collins*, 103 Mich. 143, 61 N. W. 267; *Crosier v. Craig*, 47 Hun (N. Y.) 83; *CHELLIS v. CHAPMAN*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, *Cooley, Cas. Damages*, 279; *Kniffen v. McConnell*, 30 N. Y. 285; *Olson v. Solverson*, 71 Wis. 663, 38 N. W. 329; *Rich-*

such damages as would place her in as good a position pecuniarily as she would have been in if the contract had been fulfilled.<sup>7</sup> The actual outlay in preparation for the marriage may be recovered, if it is specially pleaded.<sup>8</sup>

#### *Nonpecuniary Losses*

The nonpecuniary losses caused by a breach of promise of marriage include the injury to reputation,<sup>9</sup> wounded affections, mortification or distress of mind, and the like.<sup>10</sup> The amount to be awarded for such items of injury is necessarily

mond v. Roberts, 98 Ill. 472; Douglas v. Gausman, 68 Ill. 170; Harrison v. Cage, Carth. 467; Johnson v. Travis, 33 Minn. 231, 23 N. W. 624; Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443. Defendant's reputation for wealth may be shown. Stratton v. Dole, 45 Neb. 472, 63 N. W. 875; Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581; Stribley v. Welz, 8 Ohio Cir. Ct. R. 571. Evidence of wealth should be confined to general reputation. Kniffen v. McConnell, 30 N. Y. 285. But see Johansen v. Modahl, 4 Neb. (Unof.) 411, 94 N. W. 533. When the declaration alleges as special damage the loss of valuable right of dower in defendant's property, evidence of his ownership of specific property is admissible. Smith v. Compton, 67 N. J. Law, 548, 52 Atl. 386, 58 L. R. A. 480. See "Breach of Marriage Promise," Dec. Dig. (Key No.) § 27; Cent. Dig. § 39.

<sup>7</sup> Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443. Cf. Miller v. Rosier, 31 Mich. 475. See "Breach of Marriage Promise," Dec. Dig. (Key No.) §§ 25, 26; Cent. Dig. §§ 38, 39.

<sup>8</sup> Glasscock v. Shell, 57 Tex. 215. See, also, Stribley v. Welz, 8 Ohio Cir. Ct. R. 571. See "Breach of Marriage Promise," Dec. Dig. (Key No.) §§ 25, 26; Cent. Dig. §§ 38, 39.

<sup>9</sup> Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102; Goddard v. Westcott, 82 Mich. 180, 188, 46 N. W. 242. See "Breach of Marriage Promise," Dec. Dig. (Key No.) §§ 25, 26; Cent. Dig. §§ 38, 39.

<sup>10</sup> Harrison v. Swift, 13 Allen (Mass.) 144; Parker v. Forehand, 99 Ga. 743, 28 S. E. 400; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669; Wells v. Padgett, 8 Barb. (N. Y.) 323; Sheahan v. Barry, 27 Mich. 217; Goddard v. Westcott, 82 Mich. 180, 188, 46 N. W. 242; Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208; Wilbur v. Johnson, 58 Mo. 600; Coolidge v. Neat, 129 Mass. 146. Plaintiff may show that she appeared sincerely attached to defendant. Sprague v. Craig, 51 Ill. 288. See "Breach of Marriage Promise," Dec. Dig. (Key No.) §§ 25, 26; Cent. Dig. §§ 38, 39.

left to the sound discretion of the jury.<sup>11</sup> If their verdict is so excessive or inadequate as to indicate passion or prejudice, it may be set aside.<sup>12</sup> As in other cases where the loss is nonpecuniary and the damages are discretionary with the jury, evidence in aggravation or mitigation is admissible to affect their estimate.

*Same—Circumstances of Aggravation*

In estimating the damages, the jury may take into account the fact that plaintiff had been seduced by defendant, as tending to increase the mortification and distress suffered by her.<sup>13</sup>

<sup>11</sup> *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Coryell v. Colbaugh*, 1 N. J. Law, 77; *Stout v. Prall*, 1 N. J. Law, 79; *Southard v. Rexford*, 6 Cow. (N. Y.) 254. And see *Hooker v. Phillippe*, 26 Ind. App. 501, 60 N. E. 167, where the jury assessed the damages at one cent. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* §§ 25, 26; *Cent. Dig.* §§ 38, 39.

<sup>12</sup> *Richmond v. Roberts*, 98 Ill. 472; *Douglas v. Gausman*, 68 Ill. 170; *Hahn v. Bettingen*, 84 Minn. 512, 88 N. W. 10; *Kellett v. Robie*, 99 Wis. 303, 74 N. W. 781; *Goodall v. Thurman*, 1 Head (Tenn.) 209; *Hattin v. Chapman*, 46 Conn. 607. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 31; *Cent. Dig.* § 47.

<sup>13</sup> *Sherman v. Rawson*, 102 Mass. 395; *Liese v. Meyer*, 143 Mo. 547, 45 S. W. 282; *Anderson v. Kirby*, 125 Ga. 62, 54 S. E. 197; *Berry v. Da Costa*, L. R. 1 C. P. 331; *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 95; *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Kniffen v. McConnell*, 30 N. Y. 285; *Wells v. Padgett*, 8 Barb. (N. Y.) 323; *Tubbs v. Van Kleek*, 12 Ill. 446; *Burnett v. Simpkins*, 24 Ill. 264; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; *Sheahan v. Barry*, 27 Mich. 217; *Bird v. Thompson*, 96 Mo. 424, 9 S. W. 788; *Coil v. Wallace*, 24 N. J. Law, 291; *Hattin v. Chapman*, 46 Conn. 607; *Daggett v. Wallace*, 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908. But see *Wrynn v. Downey*, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63. But it must be pleaded. *Leavitt v. Cutler*, 37 Wis. 46; *Tyler v. Salley*, 82 Me. 128, 19 Atl. 107; *Cates v. McKinney*, 48 Ind. 562, 17 Am. Rep. 768. Contra, *Jennette v. Sullivan*, 63 Hun, 361, 18 N. Y. Supp. 266. Loss of time and medical expenses resulting from seduction cannot be recovered. *Tyler v. Salley*, 82 Me. 128, 19 Atl. 107; *Giese v. Schultz*, 53 Wis. 462, 10 N. W. 598. Damages may be recovered for the pain and humiliation of giving birth to a bastard. *Wilds v. Bogan*, 57 Ind. 453. In some states seduction cannot be proved in aggravation of damages. *Weaver v. Bachert*, 2 Pa. 80, 44 Am. Dec. 159; *Gring v. Lerch*, 112 Pa. 244, 250, 3 Atl.

"If by reason of an imprudent and criminal act, in which both participated, she is brought to such a state that the suffering occasioned to her feelings and affections must necessarily be increased by his abandonment, then that would be but an inadequate and poor compensation which did not take it into account."<sup>14</sup> The seduction must have been accomplished by means of the promise of marriage;<sup>15</sup> and it has also been held that an attempt to seduce may be shown in aggravation.<sup>16</sup>

In connection with the question how far plaintiff has been wounded in her affections, or suffered mortification or distress, the jury may consider the length of time during which the engagement had subsisted,<sup>17</sup> and the abruptness and humiliation with which it was broken.<sup>18</sup> Where a woman has been wantonly deserted after a long engagement, and when her affections have been deeply implanted, her wounded spirit, the disgrace, the insult to her feelings, the probable solitude which may result by reason of such desertion, after a long courtship, are all matters to be considered by the jury.<sup>19</sup> For

841, 56 Am. Rep. 314; *Tyler v. Salley*, 82 Me. 128, 19 Atl. 107; *Burks v. Shain*, 2 Bibb (Ky.) 341, 5 Am. Dec. 616. It is for the jury to say whether they will consider the fact of seduction in estimating damages, and it is error to instruct that they must consider it. *OSMUN v. WINTERS*, 25 Or. 260, 35 Pac. 250, *Cooley*, Cas. Damages, 274. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 40-43.

<sup>14</sup> *Sherman v. Rawson*, 102 Mass. 395. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 40-43.

<sup>15</sup> *Espy v. Jones*, 37 Ala. 379. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 40-43.

<sup>16</sup> *Kaufman v. Fye*, 99 Tenn. 145, 42 S. W. 25. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 40-43.

<sup>17</sup> *Coolidge v. Neat*, 129 Mass. 146; *Grant v. Wiley*, 101 Mass. 356. See, also, *Olmstead v. Hoy*, 112 Iowa, 349, 83 N. W. 1056. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 38, 40-43.

<sup>18</sup> *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. 321. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 38, 40-43.

<sup>19</sup> *Coolidge v. Neat*, 129 Mass. 146. Plaintiff's altered social position may be considered. *Smith v. Woodfine*, 1 C. B. (N. S.) 660; *Berry v. Da Costa*, L. R. 1 C. P. 331. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 28; *Cent. Dig.* §§ 40-43.



the purpose of enhancing damages, the plaintiff may prove that she announced the fact of her engagement to her friends, and invited them to attend the wedding.<sup>20</sup>

It has also been held in several cases that the attempt to justify a breach of promise of marriage by stating, upon the record, as the cause of desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, is a circumstance which ought to aggravate damages, when there is a complete failure to prove the charge.<sup>21</sup> The reason for the rule has been said to be that a verdict for nominal or trifling damages under such circumstances would be fatal to the character of the plaintiff. It has been intimated that the rule only applies where the justification is pleaded,<sup>22</sup> but it has been held to be equally applicable where evidence of such facts is offered in mitigation, without being specially pleaded.<sup>23</sup> It is certainly an anomaly, in an action for a breach of contract, to hold that setting up matters in an answer to excuse such breach, the proof of which fails, is an aggravation of damages,<sup>24</sup> but this action is anomalous in many other respects. The rule has been denied,<sup>25</sup> and in some states it applies only when the justification was made in bad faith.<sup>26</sup>

<sup>20</sup> Reed v. Clark, 47 Cal. 194; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 28; Cent. Dig. §§ 38, 40-43.

<sup>21</sup> Southard v. Rexford, 6 Cow. (N. Y.) 254; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 28; Cent. Dig. §§ 40-43.

<sup>22</sup> Kniffen v. McConnell, 30 N. Y. 285, per Ingraham, J. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 28; Cent. Dig. §§ 40-43.

<sup>23</sup> Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Kniffen v. McConnell, 30 N. Y. 285; Davis v. Slagle, 27 Mo. 600. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 28; Cent. Dig. §§ 40-43.

<sup>24</sup> Kniffen v. McConnell, 30 N. Y. 285; Leavitt v. Cutler, 37 Wis. 46, 53. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 28; Cent. Dig. §§ 40-43.

<sup>25</sup> Hunter v. Hatfield, 68 Ind. 416. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 28; Cent. Dig. §§ 40-43.

<sup>26</sup> Albertz v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584; Leavitt v. Cutler, 37 Wis. 46; Blackburn v. Mann, 85 Ill. 222; Fidler v. McKinley, 21 Ill. 308; Denslow v. Van Horn, 16 Iowa, 476;

*Same—Circumstances in Mitigation*

The defendant may show, in mitigation of damages, licentious conduct in plaintiff, and her general character as to sobriety and virtue, without any limitation as to time. "The object of this action is, not merely compensation for the immediate injury sustained, but damages for the loss of reputation. This must necessarily depend on the general conduct of the party subsequent to, as well as previous to, the injury complained of, and the damages to be recovered, as in actions for defamation, ought to be regulated by all the circumstances of the case. The proof of reputation cannot depend on time. It is a question which is general in its nature; and the inquiry respecting it, when material, must be general."<sup>27</sup> A breach of the criminal law by the plaintiff, as by profane cursing and swearing, though not a defense to the action, may be given in mitigation of damages.<sup>28</sup> Evidence of plaintiff's abusive conduct towards defendant's mother and sister, and of her lewd and immodest conduct, can be considered only in mitigation of damages.<sup>29</sup> Consanguinity, not within the forbidden degrees, will not mitigate or excuse a breach of promise to marry.<sup>30</sup> The jury cannot consider, in mitigation of dam-

Reed v. Clark, 47 Cal. 194. See, also, Simpson v. Black, 27 Wis. 206. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 28; Cent. Dig. §§ 40-43.

<sup>27</sup>Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102; Id., 3 Johns. Cas. N. Y. (3d Ed.) 437. See, generally, Button v. McCauley, 38 Barb. (N. Y.) 413, 5 Abb. Prac. N. S. (N. Y.) 29; Albertz v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584; Williams v. Hollingsworth, 6 Baxt. 12; Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783. But defendant cannot show the unchaste conduct or bad reputation of other members of plaintiff's family. Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 29; Cent. Dig. §§ 44, 45.

<sup>28</sup>Berry v. Bakeman, 44 Me. 164. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 29; Cent. Dig. §§ 44, 45.

<sup>29</sup>Albertz v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 29; Cent. Dig. §§ 44, 45.

<sup>30</sup>Id.

ages, the probability that, owing to defendant's want of love and affection, such as a husband should bear his wife, the marriage would be an unhappy one. "It virtually would have been saying that the plaintiff ought not to recover the damage actually sustained because the defendant might have inflicted a greater. In other words, it would be offsetting the injury that he might have done against that already inflicted."<sup>31</sup> It has been held that the fact that defendant is afflicted with an incurable disease may be shown in mitigation of damages. In *Johnson v. Jenkins*,<sup>32</sup> defendant was permitted to show, in mitigation of damages, that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health. It has been held that an offer by the defendant to marry plaintiff, made after suit brought, is not admissible in mitigation of damages.<sup>33</sup>

Defendant's knowledge, at the time the promise is made, of the facts relied on as a defense or to mitigate the damages is important. Thus, if the promise is made in ignorance of the fact that plaintiff had borne a bastard child, or had indulged in illicit intercourse with other men, such facts constitute a complete bar to the action;<sup>34</sup> but, if known to defendant, they constitute no defense,<sup>35</sup> and at most can be

<sup>31</sup> *Piper v. Kingsbury*, 48 Vt. 480. See, also, *Walker v. Johnson*, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 29; *Cent. Dig.* §§ 44, 45.

<sup>32</sup> 24 N. Y. 252. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 29; *Cent. Dig.* §§ 44, 45.

<sup>33</sup> *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Bennett v. Beam*, 42 Mich. 346, 352, 4 N. W. 8, 36 Am. Rep. 442; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Southard v. Rexford*, 6 Cow. (N. Y.) 254. Contra, *Kelly v. Renfro*, 9 Ala. 325, 44 Am. Dec. 441. But see *McCarty v. Heryford* (C. C.) 125 Fed. 46, where it is held that, if the offer is made in good faith, it is admissible in mitigation. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 29; *Cent. Dig.* §§ 44, 45.

<sup>34</sup> *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122; *Guptill v. Verback*, 58 Iowa, 98, 12 N. W. 125; *Berry v. Bakeman*, 44 Me. 164; *Budd v. Crea*, 6 N. J. Law, 370; *Burnett v. Simpkins*, 24 Ill. 264; *Johnson v. Travis*, 33 Minn. 231, 22 N. W. 624. Such facts must be pleaded. *Smith v. Braun*, 37 La. Ann. 225.

<sup>35</sup> *Burnett v. Simpkins*, 24 Ill. 264; *Johnson v. Travis*, 33 Minn. 231, 22 N. W. 624; *Denslow v. Van Horn*, 16 Iowa, 476; *Kelley*

considered only in mitigation.<sup>86</sup> Thus, it has been held that, if the lack of virtue is relied on to absolve the defendant from the fulfillment of his contract, his knowledge of that fact must have been acquired after entering into the engagement, and the defendant must have terminated the engagement immediately upon being apprised of the truth. But the bad character of the plaintiff may be shown in mitigation of damages, even though the defendant was cognizant of the facts at the time of making the contract, for the reason that its breach does not result in the same injury as if the character had been good.<sup>87</sup>

### EXEMPLARY DAMAGES

#### 167. Exemplary damages are awarded on the same principles as in tort actions.

Actions for breach of promise of marriage are, as to dam-

v. Highfield, 15 Or. 277, 14 Pac. 744; Irving v. Greenwood, 1 Car. & P. 350; Bench v. Merrick, 1 Car. & K. 463. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 13; *Cent. Dig.* §§ 4-10.

<sup>86</sup> Denslow v. Van Horn, 16 Iowa, 476. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 29; *Cent. Dig.* §§ 44, 45.

<sup>87</sup> Burnett v. Simpkins, 24 Ill. 264; Kantzler v. Grant, 2 Ill. App. 236. See, also, Butler v. Eschleman, 18 Ill. 44; Doubet v. Kirkman, 15 Ill. App. 622; Denslow v. Van Horn, 16 Iowa, 476; Palmer v. Andrews, 7 Wend. (N. Y.) 142; Von Storch v. Griffin, 77 Pa. 504; Budd v. Crea, 6 N. J. Law, 370; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925. "Any misconduct showing that the party complaining would be an unfit companion in married life may be given in evidence in mitigation." *Suth. Dam.* § 990, citing Leeds v. Cook, 4 Esp. 256; Button v. McCauley, 5 Abb. Prac. N. S. (N. Y.) 29; Albertz v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584. Declarations of plaintiff that she cared nothing for defendant, and only wanted his money, and to spite his family, are admissible in mitigation of damages. Miller v. Rosier, 31 Mich. 475. But see Miller v. Hayes, 34 Iowa, 496, 11 Am. Rep. 154. See, also, Robinson v. Craver, 88 Iowa, 381, 55 N. W. 492. Where defendant had seduced plaintiff under promise, it has been held that he cannot prove her general bad character between the promise and the breach. Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Espy v. Jones, 37 Ala. 379. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 29; *Cent. Dig.* §§ 44, 45.

ages, classed with actions for torts; and the motives of defendant may be inquired into with a view to furnishing ground for punitive damages.<sup>38</sup> Precisely the same rules govern the allowance of exemplary damages as would be applied if the action were in tort.<sup>39</sup> Evidence of the circumstances under which the promise was broken is admissible in aggravation or mitigation of damages. "It is always competent, for the purpose of enhancing the damages, to prove the motive that actuated the defendant; that he entered into the contract, and broke it, with bad motives and a wicked heart; and it is competent for him to prove, in mitigation of damages, that his motives were not bad, and that his conduct was neither cruel nor malicious." In the case of *Johnson v. Jenkins*,<sup>40</sup> it was held competent, in mitigation of damages, for the defendant to prove, when asked by the plaintiff why he had discontinued his visits to her, that he declared that his affection and regard for her were undiminished, but that he could not marry her, because his parents were so violently opposed to the match. Judge Allen, writing the opinion of the court, says: "Every circumstance attending the breaking off of the engagement becomes part of the *res gestæ*. The reasons which were operative and influential with the defendant are material, so far as they can be ascertained; and whether they are such as, tending to show a willingness to trifle with the contract and with the rights of the plaintiff, should enhance the damages, or, on the contrary, showing a motive consistent

<sup>38</sup> *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* § 46.

<sup>39</sup> See ante, p. 310; *CHELLIS v. CHAPMAN*, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, *Cooley, Cas. Damages*, 279; *Jacoby v. Stark*, 205 Ill. 34, 68 N. E. 557; *Tamke v. Vangsnes*, 72 Minn. 236, 75 N. W. 217. But see *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302. The allowance of exemplary damages is discretionary with the jury, and it is reversible error to instruct them that, if they find that defendant purposely wronged plaintiff and that his conduct was malicious, they are bound to give exemplary damages. *Jacobs v. Sire*, 4 Misc. Rep. 398, 23 N. Y. Supp. 1063. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* § 46.

<sup>40</sup> 24 N. Y. 252. See "*Breach of Marriage Promise*," *Dec. Dig. (Key No.)* § 30; *Cent. Dig.* § 46.

with any just appreciation of and regard for his duties, should confine the damages within the limit of a just compensation, will always be for the jury to determine."<sup>41</sup>

<sup>41</sup>Thorn v. Knapp, 48 N. Y. 474, 1 Am. Rep. 561. See, generally, CHELLIS v. CHAPMAN, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, Cooley, Cas. Damages, 279; Coil v. Wallace, 24 N. J. Law, 291; Coryell v. Colbaugh, 1 N. J. Law, 77, 1 Am. Dec. 192; Johnson v. Travis, 33 Minn. 231, 23 N. W. 624; Kelley v. Highfield, 15 Or. 277, 14 Pac. 744; Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925; Moore v. Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248. Evidence of matters in aggravation of damages which occur after the suit is brought is incompetent. On this principle a letter, addressed by defendant to plaintiff, accusing her of unchasteness and containing many gross and indecent expressions, was excluded. Greenleaf v. McColley, 14 N. H. 303. Charges of immorality in an affidavit during progress of trial are inadmissible. Leavitt v. Cutler, 37 Wis. 46. See "*Breach of Marriage Promise*," Dec. Dig. (Key No.) § 30; Cent. Dig. § 46.



# TABLE OF CASES CITED

[THE FIGURES REFER TO PAGES]

## A

- Aaron v. Southern Ry., 312.  
 Abbot v. McCadden, 447.  
 Abby v. Wood, 487.  
 Abeles v. Western Union Tel. Co., 414.  
 Aber v. Bratton, 104, 108.  
 Abrahams v. Cooper, 152.  
 Abrams v. Kounts, 210.  
 Ackerman v. Emott, 266.  
 Ackerman v. Rubens, 355.  
 Ackerson v. Erie R. Co., 328.  
 Acme Brewing Co. v. Central R. & Banking Co., 494.  
 Adams v. Adams, 267.  
 Adams v. Chicopee, 59.  
 Adams v. Cordis, 133, 299.  
 Adams v. Ft. Plain Bank, 247.  
 Adams v. Gardner, 338.  
 Adams v. Hastings & D. R. Co., 119, 122, 124, 125.  
 Adams v. O'Connor, 190.  
 Adams v. Palmer, 229.  
 Adams v. Robinson, 30, 32.  
 Adams v. San Antonio & A. P. R. Co., 435.  
 Adams v. Smith, 144, 153, 171.  
 Adams Exp. Co. v. Egbert, 100, 104.  
 Adams Exp. Co. v. Milton, 249.  
 Adamson v. Peterson, 192.  
 Addams v. Heffernan, 267.  
 Agincourt, The, 17.  
 Agnew v. Johnson, 281.  
 Agricultural & Mech. Ass'n of Washington v. State, 459, 460.  
 Ahern v. Steele, 456.  
 Alkin v. Perry, 96.  
 Alabama, etc., R. Co. v. Cumberland Tel. Co., 387.  
 Alabama G. S. R. Co. v. Arnold, 334.  
 Alabama G. S. R. Co. v. Burgess, 101, 426.  
 Alabama G. S. R. Co. v. Frazier, 130.  
 Alabama G. S. R. Co. v. Heddleston, 379.  
 Alabama G. S. R. Co. v. McAlpine, 255.  
 Alabama G. S. R. Co. v. Sellers, 311.  
 Alabama Iron Works v. Hurley, 112.  
 Alabama Mineral R. Co. v. Jones, 465, 489.  
 Alaska Fish & Lumber Co. v. Chase, 93.  
 Albertz v. Albertz, 526, 527, 520.  
 Alder v. Keighley, 82.  
 Aldrich v. Dunham, 228.  
 Aldrich v. Goodell, 79.  
 Aldrich v. Sager, 67.  
 Aldrich v. Weeks, 177.  
 Aldworth v. Lynn, 122, 123, 126.  
 Alexander v. Blodgett, 152, 156.  
 Alexander v. Herr's Ex'rs, 497.  
 Alexander v. Jacoby, 61, 135.  
 Alexander v. Kerr, 506.  
 Alexander v. New Castle, 59.  
 Alexander v. Western Union Tel. Co., 393, 395, 401.  
 Alger-Fowler Co. v. Tracy, 358.  
 Allaback v. Utt, 321.  
 Allaire v. Whitney, 3, 32.  
 Allen v. Atkinson, 510.  
 Allen v. Baker, 521.  
 Allen v. Barrett, 187.  
 Allen v. Blunt, 133.  
 Allen v. Brazier, 213, 222.  
 Allen v. Butman, 192.  
 Allen v. Camden & P. Steamboat Ferry Co., 157.  
 Allen v. Dykers, 281.  
 Allen v. Fox, 253.  
 Allen v. Hallet, 18.  
 Allen v. Jarvis, 352.  
 Allen v. Mohn, 512.  
 Allen v. Pioneer Press Co., 179.



[The figures refer to pages]

- Baltimore & O. R. Co. v. Barger, 386.  
 Baltimore & O. R. Co. v. Blocher, 328.  
 Baltimore & O. R. Co. v. Boyd, 108.  
 Baltimore & O. R. Co. v. Carr, 40, 140, 341, 381.  
 Baltimore & O. R. Co. v. Noell's Adm'r, 432, 465.  
 Baltimore & O. R. Co. v. Pumphrey, 372.  
 Baltimore & O. R. Co. v. Stanley, 448.  
 Baltimore & O. R. Co. v. State, 442, 443, 445, 469, 470.  
 Baltimore & O. R. Co. v. Wightman's Adm'r, 442, 443, 480.  
 Baltimore & P. R. Co. v. Fifth Baptist Church, 139, 506.  
 Baltimore & P. R. R. Co. v. Galloway, 472.  
 Baltimore & P. R. Co. v. Mackey, 476.  
 Baltimore & P. R. Co. v. Reaney, 43, 58.  
 Baltimore & R. Turnpike Road v. State, 443.  
 Baltzer v. Chicago, M. & N. R. Co., 343.  
 Bancroft v. Cambridge, 17.  
 Bangor & P. R. Co. v. McComb, 256.  
 Bangs v. Little, 17.  
 Bank of British Columbia v. Port Townsend, 331.  
 Bank of Metropolis v. Guttschlick, 331.  
 Bank of Montgomery County v. Reese, 285, 287, 292.  
 Bank of Palo Alto v. Pacific Postal Tel. & Cable Co., 135.  
 Banks v. McClellan, 267.  
 Barbee v. Reese, 46, 152.  
 Barber v. Scott, 25.  
 Barbour v. Nichols, 509.  
 Barbour v. Stephenson, 172.  
 Barclay v. Kennedy, 265.  
 Bare v. Hoffman, 120, 251.  
 Barker v. Dixie, 345.  
 Barker v. Lewis Storage & Transfer Co., 277, 279.  
 Barker v. Western Union Tel. Co., 396.  
 Barlass v. Braash, 282.  
 Barley v. Chicago & A. R. Co., 429.  
 Barnard v. Poor, 111, 132.  
 Barnes v. Brown, 357.  
 Barnes v. Campbell, 171.  
 Barnes v. Clement, 216.  
 Barnes v. Hathorn, 507.  
 Barnes v. Jones, 504.  
 Barnes v. Martin, 152.  
 Barnes v. Western Union Tel. Co., 144, 169.  
 Barnett v. Luther, 36.  
 Barnum v. Chicago, M. & St. P. R. Co., 491.  
 Baron v. Abeel, 497.  
 Barr v. Logan, 355.  
 Barr v. Moore, 320, 323.  
 Barrelett v. Bellgard, 185.  
 Barrett v. Porter, 518.  
 Barrett v. Western Union Tel. Co., 407.  
 Barrick v. Schifferdecker, 119, 122, 499.  
 Barringer v. King, 231.  
 Barron v. Illinois Cent. R. Co., 491.  
 Barron v. Morrison, 238.  
 Barron v. Mullin, 275, 355.  
 Barrow v. Arnaud, 91, 356.  
 Barrow v. Rhineland, 264.  
 Barry v. Bennett, 281.  
 Barry v. Harris, 211.  
 Bartella v. Redfield, 259.  
 Bartelt v. Braunsdorf, 331.  
 Barth v. Merritt, 342.  
 Bartlett v. Blanchard, 360.  
 Bartlett v. Kidder, 193.  
 Barton v. Kavanaugh, 25.  
 Barton Coal Co. v. Cox, 501.  
 Bartow v. Erie R. Co., 104.  
 Bass v. Chicago & N. W. R. Co., 328.  
 Bass v. Postal Tel. Cable Co., 400.  
 Bassett v. Salisbury Mfg. Co., 35.  
 Basten v. Butter, 364.  
 Batchelder v. Bartholomew, 338.  
 Bateman v. Ryder, 278, 280.  
 Bates v. Clark, 185.  
 Bates v. Courtwright, 188.  
 Bates v. Stansell, 294.  
 Batterson v. Chicago & G. T. R. Co., 171, 385.  
 Battin v. Bigelow, 494.  
 Battishill v. Reed, 505.  
 Bauer v. Gottmanhausen, 315.  
 Bauer v. Richter, 472.  
 Baxendale v. Railroad Co., 135.  
 Bayliss v. Fisher, 3.  
 Beach v. Bay State Co., 425.  
 Beach v. Crain, 117, 519.  
 Beach v. Hancock, 156.  
 Beach v. Trudgain, 18.  
 Beall v. Silver, 238.  
 Beals v. Guernsey, 229, 254.  
 Beaman v. Martha Washington Min. Co., 451.  
 Bean v. Chapman, 259.  
 Beardmore v. Carrington, 302, 342.  
 Bearss v. Preston, 192.

[The figures refer to pages]

- Beasley v. Western Union Tel. Co., 162, 166, 400.  
 Beattie v. Moore, 346.  
 Beatty Lumber Co. v. Western Union Tel. Co., 393.  
 Beauchamp v. Saginaw Min. Co., 46.  
 Beaudrat v. Southern R. Co., 504.  
 Beaulieu v. Great Northern R. Co., 75, 160, 161, 163.  
 Beaumont Traction Co. v. Dilworth, 444, 448.  
 Beaupre v. Pacific & A. Tel. Co., 391, 413.  
 Beavers v. Smith, 498.  
 Beck v. Dowell, 316.  
 Beck v. Thompson, 152, 309.  
 Becker v. Dupree, 312, 324.  
 Beckett v. Railroad Co., 480.  
 Beckwith v. New York, 247.  
 Bedell v. Shaw, 496.  
 Beebe v. Birmingham Ry., Light & Power Co., 154.  
 Beecher v. Ferry Co., 309.  
 Beecher v. Long Island R. Co., 466.  
 Beede v. Lamprey, 282, 283, 501.  
 Beeman v. Banta, 83, 367, 368.  
 Beems v. Chicago, R. I. & P. R. Co., 477.  
 Beers v. Board of Health, 99.  
 Beers v. Hamburg-American Packet Co., 328.  
 Beeson v. Green Mountain Gold Min. Co., 431.  
 Behm v. Western Union Tel. Co., 414.  
 Beideman v. Atlantic City R. Co., 16.  
 Belknap v. Boston & M. R. R., 315, 326.  
 Bell v. Medford, 497.  
 Bell v. Norfolk S. R. Co., 16.  
 Bell v. Railroad Co., 147, 381.  
 Bell v. Reynolds, 359.  
 Bell's Adm'r's v. Logan, 230.  
 Belloc v. Davis, 297.  
 Bellows v. Sackett, 507.  
 Bench v. Merrick, 529.  
 Bender v. Fromberger, 40.  
 Benners v. Clemens, 299.  
 Bennet v. Jenkins, 516.  
 Bennett v. Beam, 522, 524, 528.  
 Bennett v. Buchan, 5.  
 Bennett v. Gibbons, 134, 309.  
 Bennett v. Hyde, 315.  
 Bennett v. Lockwood, 90.  
 Bennett v. Smith, 315.  
 Bennett v. Western Union Tel. Co., 400, 402.  
 Benson v. Chicago & A. R. Co., 119.  
 Benson v. Malden & Melrose Gaslight Co., 90.  
 Benson v. Matsdorf, 494.  
 Benson v. President, etc., of Village of Waukesha, 37.  
 Benton v. Chicago, R. I. & P. R. Co., 462, 475.  
 Benton v. Fay, 81, 91, 109, 111.  
 Benziger v. Miller, 79.  
 Berg v. St. Paul City R. Co., 380.  
 Berg v. United States Leather Co., 132.  
 Berger v. Minneapolis Gaslight Co., 506.  
 Berghelm v. Steel Co., 213.  
 Bergmann v. Jones, 320.  
 Berkey & Gay Furniture Co. v. Hascall, 361.  
 Bernadsky v. Erie R. Co., 152.  
 Bernhisel v. Firman, 200.  
 Bernstein v. Meech, 131.  
 Berrinkott v. Traphagen, 205.  
 Berry v. Bakeman, 527, 528.  
 Berry v. Da Costa, 8, 522, 524, 525.  
 Berry v. Dwinel, 272.  
 Berry v. Harris, 118.  
 Berry v. Vantries, 321.  
 Berry v. Wisdom, 217, 219.  
 Bertha Zinc Co. v. Black's Adm'r, 432, 486.  
 Bertholf v. O'Reilly, 67.  
 Beseman v. Pennsylvania R. Co., 16.  
 Besenecker v. Sale, 429.  
 Bessemer Land & Imp. Co. v. Jenkins, 158.  
 Bethel v. Salem Imp. Co., 236.  
 Bethell v. Mellor & Rittenhouse Co., 230, 252.  
 Betts v. Burch, 195.  
 Beymer v. McBride, 91.  
 B. F. Myers Tailoring Co. v. Keeley, 519.  
 Bibb v. Freeman, 513.  
 Bickell v. Colton, 246, 294.  
 Bickford v. Rich, 258.  
 Bicknell v. Waterman, 246.  
 Bicknell v. Colton, 280.  
 Bielman v. Chicago, St. P. & K. C. R. Co., 505.  
 Bierbach v. Goodyear Rubber Co., 107.  
 Bierbauer v. New York Cent. & H. R. R. Co., 484.  
 Bierhaus v. Western Union Tel. Co., 409, 410.  
 Bigelow v. American Forcite Powder Mfg. Co., 94.  
 Bigelow v. Doolittle, 253, 254.  
 Bigelow v. Metropolitan St. R. Co., 139.

[The figures refer to pages]

- Bigham v. Wabash-Pittsburgh Terminal R. Co., 75.  
 Bigler v. Waller, 259.  
 Bignall v. Gould, 218.  
 Bigony v. Tyson, 211.  
 Billman v. Indianapolis, C. & L. R. Co., 61.  
 Billmeyer v. Wagner, 71, 360.  
 Binford v. Johnston, 67.  
 Binford v. Young, 320.  
 Bingham v. Walla Walla, 108.  
 Bingham v. Weiderwax, 513.  
 Birchard v. Booth, 315.  
 Bird v. Thompson, 162, 524.  
 Bird v. Wilmington & M. R. Co., 319.  
 Birkett v. Knickerbocker Ice Co., 456, 461, 476.  
 Birmingham Ry., Light & Power Co. v. Nolan, 318, 380.  
 Birney v. New York & W. Printing Tel. Co., 413.  
 Birum v. Johnson, 522.  
 Biscoe v. Railway, 17.  
 Bishop v. Hendrick, 132.  
 Bispham v. Pallock, 229.  
 Bissell v. Gold, 156.  
 Bissell v. Hopkins, 229, 254.  
 Bixby v. Dunlan, 172, 310, 322.  
 Black v. Baxendale, 377.  
 Black v. Camden & A. R. & Transp. Co., 251.  
 Black v. Carrollton R. Co., 154, 322.  
 Black v. Minneapolis & St. L. R. Co., 251.  
 Black v. Robinson, 282.  
 Blackburn v. Mann, 526.  
 Blackie v. Cooney, 254.  
 Blackmer v. Cleveland, C., C. & St. L. R. Co., 371.  
 Blackmore v. Ellis, 319.  
 Black River Lumber Co. v. Warner, 353.  
 Blackwell v. Landreth, 181.  
 Blackwell v. Lynchburg & D. R. Co., 442.  
 Blackwell Mill., etc., Co. v. Western Union Tel. Co., 387.  
 Blake v. Lord, 45.  
 Blake v. Midland R. Co., 424, 428, 436.  
 Blakeney v. Blakeney, 3.  
 Blanchard v. Ely, 109.  
 Blanchard's Gun-Stock Turning Factory v. Warner, 133.  
 Blaney v. Hendricks, 226, 227.  
 Bleakley v. Sheridan, 247.  
 Bledsoe v. Nixon, 266, 267.  
 Bliss v. New York Cent. & H. R. R. Co., 114.  
 Blocker v. Schoff, 180.  
 Blodgett v. Brattleboro, 313.  
 Blofeld v. Payne, 36.  
 Bloss v. Plymale, 186.  
 Blount v. Garen, 494.  
 Blum v. Merchant, 282.  
 Blumhardt v. Rohr, 153.  
 Blunt v. Egeland, 208.  
 Blunt v. Little, 347.  
 Blunt v. McCormick, 120, 122, 126.  
 Blydenburgh v. Welsh, 271, 272.  
 Blythe v. Denver & R. G. R. Co., 54.  
 Blythe v. Tompkins, 137.  
 Board of Com'rs of Howard County v. Legg, 444.  
 Board of Com'rs of Rush County v. Trees, 500.  
 Board of Directors of St. Francis Levee Dist. v. Reddit, 334.  
 Board of Internal Improvement of Shelby County v. Searce, 425.  
 Board of Sup'rs of Clay County v. Board of Sup'rs of Chickasaw County, 237.  
 Board of Sup'rs of Warren County v. Klein, 228, 237.  
 Boardman v. Goldsmith, 317, 349.  
 Boardman v. Marshalltown Grocery Co., 132, 311.  
 Boddam v. Riley, 226.  
 Boetcher v. Staples, 323.  
 Bogk v. Gassert, 181.  
 Rohland v. Barrett, 349.  
 Bohn v. Cleaver, 112, 370.  
 Bolinger v. Brake, 513.  
 Bolinger v. St. Paul & D. R. Co., 442, 443, 444.  
 Bolivar Mfg. Co. v. Neponset Mfg. Co., 31.  
 Bolling v. Lersner, 494.  
 Bolling v. Tate, 135.  
 Bond v. Greenwald, 298.  
 Bonesteel v. Bonesteel, 137.  
 Bonino v. Caledonio, 176.  
 Boorman v. Nash, 352.  
 Booth v. Ableman, 236.  
 Booth v. Powers, 276.  
 Booth v. Ratte, 504.  
 Booth v. Spuyten Duyvil Rolling-Mill Co., 47, 75, 82, 83, 84, 358, 361, 362.  
 Borchardt v. Wassau Boom Co., 64.  
 Borders v. Barber, 224, 260.  
 Bordley v. Eden, 259.  
 Borkenstein v. Schrack, 320, 322.  
 Borland v. Barrett, 313, 317, 320, 349.  
 Borradaile v. Brunton, 55, 81.  
 Borries v. Hutchinson, 82, 361.  
 Boston, C. & M. R. R. v. State, 425.  
 Boston Mfg. Co. v. Fiske, 133.

[The figures refer to pages]

- Bostwick v. Losey, 520.  
 Boulard v. Calhoun, 324.  
 Boulden v. Pennsylvania R. Co., 481.  
 Boulter v. Webster, 439, 488.  
 Boulware v. Crohn, 216.  
 Bourdette v. Sieward, 30.  
 Bourland v. Choctaw, O. & G. R. Co., 85.  
 Bourne v. Ashley, 281.  
 Boutin v. Rudd, 75, 78, 81.  
 Boutwell v. Marr, 312.  
 Bovee v. Danville, 60, 158.  
 Bowas v. Pioneer Tow Line, 44, 66.  
 Bowden v. Bailes, 313, 320.  
 Bowditch v. Boston, 18.  
 Bowen v. Barkadale, 264.  
 Bowen v. Clark, 297.  
 Bowen v. Darby, 298.  
 Bowen v. King, 45, 64, 65.  
 Bower v. Hill, 36.  
 Bowers v. Mississippi & R. R. Boom Co., 116, 120, 126.  
 Bowers v. Western Union Tel. Co., 144, 169.  
 Bowie v. Western Union Tel. Co., 397.  
 Bowler v. Lane, 314, 326.  
 Bowles v. Rome, W. & O. R. Co., 484.  
 Bowman v. Neely, 263, 266.  
 Bowman v. Teall, 3, 185, 373.  
 Bowyer v. Cook, 120.  
 Boyd v. Blue Ridge R. Co., 314.  
 Boyd v. Brown, 103.  
 Boyd v. Fitt, 61.  
 Boyd v. Gilchrist, 228.  
 Boyd v. New York, C. & H. R. R. Co., 479.  
 Boyd's Lessee v. Cowan, 494.  
 Boyden v. Hill, 47, 75.  
 Boylan v. Huguet, 282.  
 Boyle v. Case, 152, 170.  
 Boylston Ins. Co. v. Davis, 295.  
 Boynton v. Kellogg, 528, 529.  
 Bracket v. McNair, 370.  
 Bradburn v. Railroad Co., 480.  
 Bradford v. Boley, 59.  
 Bradlaugh v. Edwards, 137.  
 Bradley v. Cramer, 102.  
 Bradley v. Denton, 97.  
 Bradley v. Geiselman, 228, 254.  
 Bradley v. Morris, 319.  
 Bradley v. Ohio River & C. R. Co., 448.  
 Bradley v. Rea, 56, 364.  
 Bradley v. Sattler, 457.  
 Bradshaw v. Buchanan, 317.  
 Bradshaw v. Craycraft, 210, 214.  
 Bradshaw v. Crosby, 519.  
 Bradshaw v. South Boston R. Co., 383.  
 Bradstreet v. Baker, 208.  
 Bradstreet Co. v. Gill, 22.  
 Brady v. Chicago, 429, 436.  
 Brady v. Wilcoxson, 230, 248.  
 Bramall v. Lees, 452.  
 Brand v. Henderson, 351.  
 Brandt v. Foster, 514, 515.  
 Brannon v. Hursell, 260.  
 Brant v. Gallup, 31, 88.  
 Brantigan v. White, 154.  
 Brasfield v. Lee, 119.  
 Brasher v. Davidson, 294.  
 Brasher v. Holtz, 282.  
 Brasineton v. South Bound R. Co., 313.  
 Brass v. Worth, 288.  
 Brauer v. Oceanic Steam Nav. Co., 77, 84, 86.  
 Braun v. Craven, 143.  
 Brayton v. Chase, 47.  
 Breckenfelder v. Lake Shore & M. S. R. Co., 446.  
 Bredow v. Mutual Sav. Inst., 275.  
 Breen v. Moran, 364.  
 Brem v. Covington, 236.  
 Bremer v. Minneapolis, St. P. & S. S. M. R. Co., 486.  
 Brennan v. Clark, 212.  
 Breon v. Henkle, 172.  
 Brewer v. Hastie, 259.  
 Brewster v. Edgerly, 197, 206, 217.  
 Brewster v. Van Liew, 282, 204.  
 Brewster v. Wakefield, 231, 260.  
 Brewster v. Warner, 190.  
 Brewster v. Western Union Tel. Co., 394, 395.  
 Brickford v. Page, 514.  
 Brickman v. Southern Ry., 482.  
 Bridges v. Hyatt, 212.  
 Bridges v. Langham, 110.  
 Bridges v. Reynolds, 298.  
 Bridges v. Stickney, 47.  
 Bridgman v. Emily, The, 370.  
 Briggs v. Brown, 45, 64, 66.  
 Briggs v. Milburn, 321.  
 Briggs v. Morse, 38.  
 Briggs v. New York Cent. & H. R. Co., 187.  
 Briggs v. Winsmith, 260.  
 Brigham v. Carlisle, 104, 108.  
 Brigham v. Evans, 509.  
 Brigham v. Vanbuskirk, 238.  
 Bright v. Western Union Tel. Co., 165.  
 Bringard v. Stellwagen, 184.  
 Brink v. Freoff, 336.  
 Brink v. Kansas City, St. J. & C. B. R. Co., 67.  
 Brink v. Wabash R. Co., 50.  
 Brinker v. Leinkauff, 185.  
 Brinkman v. St. Laundry Cotton Oil Co., 154.

[The figures refer to pages]

- Brion v. Kennedy, 236.  
 Briscoe v. McElween, 281.  
 British Cast Plate Manufacturers v. Meredith, 18.  
 British Columbia & Vancouver's Island Spar, Lumber & Saw Mill Co. v. Nettleship, 83, 360, 361, 371.  
 Britt v. Carolina Northern R. Co., 150.  
 Brizee v. Maybee, 254, 321.  
 Broadway Sav. Bank v. Forbes, 260, 261.  
 Broadwell v. Paradise, 190.  
 Brock v. Gale, 79.  
 Brockway v. Clark, 206.  
 Broderick v. James, 22.  
 Bromage v. Prosser, 25.  
 Bronson v. Coffin, 517.  
 Bronson v. Forty-Second St., M. & St. N. A. R. Co., 344.  
 Bronson v. Rodes, 297.  
 Brooks v. Black, 515.  
 Brooks v. Hubbard, 300.  
 Brooks v. Miller, 512.  
 Broquet v. Tripp, 56.  
 Broughel v. Southern New England Tel. Co., 444.  
 Broughton v. McGrew, 175.  
 Broughton v. Mitchell, 230, 235, 267.  
 Brown v. Allen, 312, 315, 504.  
 Brown v. Aunard S. S. Co., 373.  
 Brown v. Baldwin, 496.  
 Brown v. Bellows, 204, 218.  
 Brown v. Bowen, 189.  
 Brown v. Calumet River R. Co., 272.  
 Brown v. Carroll, 192.  
 Brown v. Chicago B. & Q. R. Co., 442.  
 Brown v. Chicago, M. & St. P. R. Co., 45, 46, 64, 66, 379.  
 Brown v. Cowles, 71, 75, 77.  
 Brown v. Cummings, 61.  
 Brown v. Doyle, 246.  
 Brown v. Durham, 22.  
 Brown v. Evans, 315, 323.  
 Brown v. Foster, 47, 112.  
 Brown v. Green, 321.  
 Brown v. Hadley, 111.  
 Brown v. Hannibal & St. J. R. Co., 333, 335.  
 Brown v. Hardcastle, 260.  
 Brown v. Hiatts, 259.  
 Brown v. Howard, 17.  
 Brown v. Jones, 135.  
 Brown v. Kendall, 27.  
 Brown v. Mauleby, 220.  
 Brown v. Morisey, 493.  
 Brown v. Muller, 358.  
 Brown v. Rapid R. Co., 383.  
 Brown v. St. Paul, M. & M. R. Co., 273.  
 Brown v. Sharkey, 358.  
 Brown v. Smith, 104.  
 Brown v. Southern R. Co., 432.  
 Brown v. Southwestern R. Co., 254.  
 Brown v. Sullivan, 150.  
 Brown v. Swineford, 176, 305, 306, 316, 323.  
 Brown v. Watson, 31, 506.  
 Brown v. Weir, 88.  
 Brown Store Co. v. Chattahoochee Lumber Co., 51, 64.  
 Browne v. Steck, 262.  
 Brownell v. Chapman, 79.  
 Browner v. Davis, 30.  
 Browning v. Simons, 30.  
 Brownson v. Wallace, 331.  
 Bruce v. Pettengill, 31, 334.  
 Brunsden v. Humphrey, 14, 28.  
 Brunswick v. White, 453, 451, 456, 457.  
 Bryan v. Acee, 349.  
 Bryant v. Jackson, 22.  
 Bryton v. Marston, 206, 218.  
 Bube v. Birmingham Ry., Light & Power Co., 322.  
 Buchanan v. Stout, 160.  
 Buchanan v. West Jersey R. Co., 147.  
 Buck v. Remsen, 190.  
 Buckingham v. Orr, 262.  
 Buckley v. Knapp, 315, 320.  
 Bucklin v. Beals, 184.  
 Bucknam v. Great Northern R. Co., 142, 148.  
 Budd v. Crea, 528, 529.  
 Budd v. Walker, 497.  
 Buddington v. Smith, 18.  
 Buel v. Chicago, R. I. & P. R. Co., 255.  
 Buena Vista Co. v. McCandlish, 348.  
 Buenzle v. Newport Amusement Ass'n, 161.  
 Buffalo & H. Turnpike Co. v. Buffalo, 254, 255.  
 Building, Light & Water Co. v. Fray, 514.  
 Bullard v. Harrison, 19.  
 Bullard v. Stane, 272.  
 Bullock v. Ferguson, 258.  
 Bullock v. White Star S. S. Co., 382.  
 Bundy v. Maginess, 319, 323.  
 Bungenstock v. Nishnabotna Drainage Dist., 505.  
 Bunny v. Hopkinson, 516.  
 Bunyea v. Metropolitan R. Co., 439.

[The figures refer to pages]

- Burdick v. Missouri Pac. R. Co., 247.  
 Burditt v. New York Cent. & H. R. Co., 499.  
 Burgess, In re, 227.  
 Burk v. Arcata & M. R. R. Co., 489.  
 Burk v. Dunn, 210.  
 Burk v. Serrill, 511.  
 Burke v. Melvin, 178.  
 Burke v. Railroad Co., 452.  
 Burkett v. Lanata, 350.  
 Burks v. Hubbard, 293.  
 Burks v. Shain, 525.  
 Burnap v. Wight, 32, 61.  
 Burnett v. Simpkins, 524, 528, 529.  
 Burnett v. Western Union Tel. Co., 155.  
 Burns v. Anderson, 260.  
 Burns v. Campbell, 324, 325.  
 Burr v. Burr, 303.  
 Burr v. Todd, 204.  
 Burrage v. Crump, 205.  
 Burrage v. Nelson, 336.  
 Burrell v. New York & S. Solar Salt Co., 47, 337.  
 Burroughs v. Richmond County Com'rs, 265.  
 Burrows v. Lowndale, 234, 250.  
 Burrows v. March Gas & Coke Co., 58.  
 Burrows v. Stryker, 266.  
 Burruss v. Hines, 104, 132.  
 Burt v. Advertiser Newspaper Co., 180.  
 Burt v. Burt, 190.  
 Burt v. Dutcher, 290.  
 Burton v. McClellan, 18.  
 Burton v. Pinkerton, 61.  
 Burton v. Wilmington & W. R. Co., 442.  
 Burtraw v. Clark, 188, 503.  
 Busch v. Robinson, 132.  
 Bussy v. Donaldson, 29, 40.  
 Bustamente v. Stewart, 38, 135.  
 Butler v. Butler, 353.  
 Butler v. Eschelman, 529.  
 Butler v. Horwitz, 297.  
 Butler v. Kirby, 235.  
 Butler v. McLellan, 18.  
 Butler v. Manhattan R. Co., 68.  
 Butler v. Mehrling, 321.  
 Butler v. Mercer, 322.  
 Butler v. Moore, 110, 366.  
 Butler v. New York & E. R. Co., 3.  
 Butler v. Western Union Tel. Co., 168.  
 Button v. McCauley, 527, 529.  
 Butts v. National Exch. Bank, 150.  
 Buxton v. Lister, 287.  
 Buzzell v. Smell, 235.  
 Byram v. McGuire, 314.  
 Byrd v. Corner, 446.  
 Byrne v. Gardner, 160.  
 Byrne v. Minneapolis & St. L. R. Co., 502.  
 Byrom v. Chapin, 192.
- C**
- Cabell v. Arnold, 177.  
 Cable v. Dakin, 321.  
 Cade v. Brown, 509.  
 Cadle v. Muscatine Western R. Co., 123.  
 Cahen v. Platt, 356, 358.  
 Cahill v. Pintony, 330.  
 Cahn v. Western Union Tel. Co., 401, 406.  
 Cairncross v. Pewaukee, 27.  
 Caldwell v. Brown, 451, 460.  
 Caldwell v. Dunklin, 235.  
 Caldwell v. New Jersey Steamboat Co., 314.  
 Caldwell v. Northern Pac. R. Co., 310.  
 Caldwell v. Vicksburg, S. & P. R., 346.  
 Calhoun v. Marshall, 266.  
 California Development Co. v. Yuma Valley Union Land & Water Co., 274.  
 California Nav. & Imp. Co., In re, 489.  
 California Steam Nav. Co. v. Wright, 211.  
 Call v. Buttrick, 507.  
 Call v. Hagar, 136.  
 Callahan v. Ingram, 178.  
 Callanan v. Brown, 276.  
 Callaway Min. & Mfg. Co. v. Clark, 104.  
 Callup v. Miller, 47.  
 Calumet Iron & Steel Co. v. Martin, 330.  
 Calumet River R. Co. v. Moore, 270.  
 Camden Consol. Oil Co. v. Schlens, 357.  
 Cameron v. Boyle, 330.  
 Cameron v. Smith, 227.  
 Camp v. Bates, 264.  
 Camp v. Camp, 321.  
 Camp v. Hamlin, 352.  
 Camp v. Wabash R. Co., 337.  
 Camp v. Western Union Tel. Co., 413.  
 Camp v. Whitman, 19.  
 Campbell v. Brown, 494, 496.  
 Campbell v. Iowa Cent. R. Co., 270.  
 Campbell v. Pullman Palace-Car Co., 46, 151, 172.  
 Campbell v. Race, 18, 19.

[The figures refer to pages]

- Campbell v. Shields, 205.  
 Campbell v. Stillwater, 67.  
 Canadian Pac. R. Co. v. Robinson, 432.  
 Canady v. Knox, 211.  
 Candee v. Webster, 258.  
 Candee v. Western Union Tel. Co., 64, 80, 411.  
 Candrian v. Miller, 182.  
 Canfield v. Chicago, R. I. & P. R. Co., 317, 320, 326.  
 Canning v. Williamstown, 12, 146, 150.  
 Cannon v. Folsom, 294.  
 Cannon v. Western Union Tel. Co., 80, 401, 414.  
 Canter v. American Ins. Co., 133.  
 Capen v. Crowell, 262.  
 Capers v. Western Union Tel. Co., 403.  
 Capital, etc., Bank v. Henty, 25.  
 Cardwill v. Gilmore, 30.  
 Carey v. Berkshire R. Co., 422, 423.  
 Carey v. Day, 437.  
 Carhart v. Auburn Gas Light Co., 35.  
 Carl v. Granger Coal Co., 31, 334.  
 Carland v. Western Union Tel. Co., 399.  
 Carlisle v. Callahan, 56, 347.  
 Carlson v. Oregon Short-Line & U. N. R. Co., 433.  
 Carlyon v. Lannan, 282, 331.  
 Carner v. Chicago, St. P., M. & O. R. Co., 501.  
 Carpenter v. American Bldg. & Loan Ass'n, 184.  
 Carpenter v. Barber, 315.  
 Carpenter v. Buffalo, N. Y. & P. R. Co., 456.  
 Carpenter v. Dresser, 184.  
 Carpenter v. Eastern Transp. Co., 187.  
 Carpenter v. First Nat. Bank, 79, 362.  
 Carpenter v. Manhattan Life Ins. Co., 184.  
 Carpenter v. Mexican Nat. R. Co., 170.  
 Carpenter v. Red Cloud, 346.  
 Carpenter v. Welch, 265.  
 Carroll v. Missouri Pac. R. Co., 480.  
 Carroll v. Wisconsin Cent. R. Co., 16.  
 Carroll Porter Boiler & Tank Co. v. Columbus Mach. Co., 359.  
 Carsten v. Northern Pac. R. Co., 156, 171, 385.  
 Carter v. Corley, 205.  
 Carter v. Oster, 145, 160.  
 Carter v. Pitcher, 500.  
 Carter v. Wabash R. Co., 45, 63.  
 Carter v. Wallace, 14.  
 Cartwright v. Gardner, 221.  
 Cary v. Courteney, 299.  
 Cary v. Gruman, 368.  
 Case v. Fish, 264.  
 Case v. Stevens, 79, 365.  
 Case v. Wolcott, 509.  
 Case Threshing Mach. Co. v. Haven, 365.  
 Cason v. Western Union Tel. Co., 402.  
 Caspar v. Prosadame, 176.  
 Cassell v. Hays, 339.  
 Cassidy v. Le Fevre, 109, 360.  
 Cassius, The, 371.  
 Casteel v. Walker, 262.  
 Castello v. Landwehr, 472.  
 Castle Garden, The, 371.  
 Caswell v. Howard, 190.  
 Catawissa R. Co. v. Armstrong, 472, 482.  
 Cates v. McKinney, 524.  
 Cates v. Western Union Tel. Co., 144, 165.  
 Catlin v. Lyman, 266.  
 Catlin v. Pond, 152.  
 Cattle v. Stockton Waterworks Co., 25.  
 Cavannagh v. Durgin, 503.  
 Cease v. Cockle, 246.  
 Cecil v. Hicks, 261.  
 Center v. Finney, 27.  
 Central Branch Union Pac. R. Co. v. Nichols, 269.  
 Central of Georgia R. Co. v. Alexander, 444.  
 Central of Georgia R. Co. v. Dorsey, 55, 57.  
 Central of Georgia R. Co. v. Morgan, 89.  
 Central Pass R. Co. v. Chatterson, 326.  
 Central R. R. v. Crosby, 477, 486, 487.  
 Central R. R. v. Moore, 475.  
 Central R. R. v. Rouse, 475.  
 Central R. R. v. Thompson, 477.  
 Central R. Co. v. Sears, 251, 478.  
 Central R. Co. v. Serfass, 138.  
 Central Railroad & Banking Co. v. Atlantic & G. R. Co., 238.  
 Central Railroad & Banking Co. v. Lanier, 335.  
 Central Railroad & Banking Co. v. Murray, 501.  
 Central Trust Co. v. Artic Ice Mach. Mfg. Co., 364.  
 Central Trust Co. of New York v. Clark, 74, 78, 80, 81.

[The figures refer to pages]

- Central Union Tel. Co. v. Swoveland, 399.  
 Chaffee's Appeal, 282.  
 Chalie v. Duke of York, 226.  
 Chalk v. Charlotte C. & A. R. Co., 64.  
 Chamberlain v. Bagley, 210.  
 Chamberlain v. Collinson, 501.  
 Chamberlain v. Oshkosh, 53, 59.  
 Chamberlain v. Parker, 32.  
 Chamberlain v. Worrell, 282.  
 Chamberlin v. Murphy, 186.  
 Chambers v. Frazier, 36.  
 Chambers v. Goldwin, 264.  
 Champion v. Vincent, 33.  
 Chandler v. Jamacai Pond Aqueduct Corp., 256.  
 Chapin v. Murphy, 260.  
 Chapman v. Chicago & N. W. R. Co., 255.  
 Chapman v. Copeland, 33.  
 Chapman v. Ingram, 351.  
 Chapman v. Kirby, 276.  
 Chapman v. Railroad Co., 371.  
 Chapman v. Rothwell, 452, 488.  
 Chapman v. Telegraph Co., 155, 165.  
 Chapman v. Thames Mfg. Co., 32, 35.  
 Chapman v. Western Union Tel. Co., 141, 166.  
 Chapman Decorative Co. v. Security Mut. Life Ins. Co., 212.  
 Chappell v. Ellis, 159.  
 Charlebois v. Gogebic & M. R. Co., 488.  
 Charman, Ex parte, 227.  
 Chase v. Allen, 217, 220.  
 Chase v. Bennett, 136.  
 Chase v. New York Cent. R. Co., 97.  
 Chase v. Western Union Tel. Co., 141, 166.  
 Chase v. Whitlock, 22.  
 Chasemore v. Richards, 17.  
 Chaude v. Shepard, 216.  
 Chauncy v. Yeaton, 253.  
 Cheddick's Ex'r v. Marsh, 211, 216, 218.  
 Cheek v. Waldrum, 235.  
 Chellis v. Chapman, 8, 315, 316, 318, 522, 530, 531.  
 Chemical Nat. Bank v. Bailey, 237.  
 Cherokee & P. Coal & Min. Co. v. Limb, 464.  
 Cherry v. McCall, 322.  
 Cherry Valley Iron Works v. Florence Iron River Co., 351.  
 Chesapeake Bank v. Swain, 298.  
 Chesapeake, O. & S. W. R. Co. v. Hendricks, 438.  
 Chesapeake & O. R. Co. v. Lang's Adm'r, 441.  
 Cheshire Turnpike v. Stevens, 120.  
 Chesley v. Chesley, 162.  
 Chesley v. Thompson, 153, 171.  
 Chesterfield v. Jansen, 225.  
 Cheveley v. Morris, 329.  
 Chicago Bridge & Iron Co. v. La Manita, 425.  
 Chicago, B. & Q. R. Co. v. Avery, 138.  
 Chicago, B. & Q. R. Co. v. Hale, 373.  
 Chicago, B. & Q. R. Co. v. Harwood, 482.  
 Chicago, B. & Q. R. Co. v. Hines, 151.  
 Chicago, B. & Q. R. Co. v. Mitchell, 123.  
 Chicago, B. & Q. R. Co. v. Sykes, 482.  
 Chicago, B. & Q. R. Co. v. Warner, 138.  
 Chicago City R. Co. v. Anderson, 151.  
 Chicago City R. Co. v. Gillam, 429.  
 Chicago City R. Co. v. Henry, 103, 131.  
 Chicago City R. Co. v. Saxby, 47, 95.  
 Chicago G. W. R. Co. v. Gitchell, 272.  
 Chicago G. W. R. Co. v. Root, 486.  
 Chicago, M. & St. P. R. Co. v. Dowd, 482.  
 Chicago, R. I. & P. R. Co. v. Austin, 441, 448, 482.  
 Chicago, R. I. & P. R. Co. v. Broe, 375.  
 Chicago, R. I. & P. R. Co. v. Carey, 98.  
 Chicago, R. I. & P. R. Co. v. Caulfield, 151.  
 Chicago, R. I. & P. R. Co. v. Young, 487.  
 Chicago, St. L. & N. O. R. Co. v. Pounds, 3, 425, 437.  
 Chicago, St. L. & N. O. R. Co. v. Scurr, 316, 317, 348, 349.  
 Chicago, St. L. & P. R. Co. v. Butler, 41.  
 Chicago, St. L. & P. R. Co. v. Holdridge, 156.  
 Chicago Terminal Transfer R. Co. v. O'Donnell, 467.  
 Chicago West Division R. Co. v. Ingraham, 115.  
 Chicago West Division R. Co. v. Klauber, 336.  
 Chicago & A. R. Co. v. Becker, 458, 482.  
 Chicago & A. R. Co. v. Carey, 491.



[The figures refer to pages]

- Chicago & A. R. Co. v. Flagg, 41,  
140, 157, 171, 382, 385.  
Chicago & A. R. Co. v. May, 441.  
Chicago & A. R. Co. v. Robbins,  
500.  
Chicago & A. R. Co. v. Shannon,  
468, 482, 489.  
Chicago & A. R. Co. v. Wilson,  
101.  
Chicago & E. I. R. Co. v. Conley,  
157.  
Chicago & E. I. R. Co. v. Driscoll,  
481.  
Chicago & E. I. R. Co. v. Loeb,  
123.  
Chicago & E. R. Co. v. Barnes,  
502.  
Chicago & E. R. Co. v. Meech,  
130.  
Chicago & I. R. Co. v. Baker, 321,  
338.  
Chicago & N. W. R. Co. v. Bay-  
field, 458, 475.  
Chicago & N. W. R. Co. v. Chis-  
holm, 156, 171, 385.  
Chicago & N. W. R. Co. v. Dickin-  
son, 371.  
Chicago & N. W. R. Co. v. How-  
ard, 474.  
Chicago & N. W. R. Co. v. Mo-  
randa, 474.  
Chicago & N. W. R. Co. v. Pea-  
cock, 342.  
Chicago & N. W. R. Co. v. Schultz,  
228, 255.  
Chicago & N. W. R. Co. v. Stan-  
bro, 372.  
Chicago & N. W. R. Co. v. Swett,  
466, 482, 489.  
Chicago & N. W. R. Co. v. Whit-  
ton, 429, 436, 449, 482.  
Chicago & N. W. R. Co. v. Wil-  
liams, 156, 157, 171, 385.  
Chick v. Southwestern R. Co., 422.  
Childers v. San Jose Mercury  
Printing & Publishing Co., 320.  
Childress v. Yourie, 67.  
Chiles v. Drake, 323, 434.  
Chilliner v. Chilliner, 221.  
Chinery v. Viall, 191, 363.  
Chisholm v. Arrington, 298.  
Chisholm v. Preferred Bankers'  
Life Assur. Co., 94.  
Christ Church Hospital v. Fuech-  
sel, 298.  
Christian v. Columbus & R. R. Co.,  
442.  
Christianson v. Linford, 8.  
Chrysler v. Renois, 298.  
Churcher v. Stringer, 231.  
Churchill v. Burlington Water Co.,  
506.  
Cincinnati, H. & I. R. Co. v. Ea-  
ton, 379.  
Cincinnati, I., St. L. & C. R. Co.  
v. Cooper, 46.  
Cincinnati, N. O. & T. P. R. Co. v.  
Cook's Adm'r, 434.  
Cincinnati St. R. Co. v. Altemeier,  
476.  
Citizens' Gas & Oil Co. v. Whip-  
ple, 186.  
Citizens' Nat. Bank of Lawrence-  
burg v. Third Nat. Bank, 92.  
Citizens' R. Co. v. Washington,  
476, 486.  
Citizens' Rapid-Transit Co. v. Dew,  
270.  
Citizens' St. R. Co. v. Steen, 314,  
326.  
Citizens' St. R. Co. v. Twiname,  
130.  
City Council of Augusta v. Lom-  
bard, 126, 127.  
City Nat. Bank v. Jeffries, 160,  
315, 327.  
City of Abilene v. Wright, 132.  
City of Allegheny v. Campbell, 254.  
City of Allegheny v. Zimmerman,  
68.  
City of Atchison v. King, 60.  
City of Bloomington v. Chamber-  
lain, 102.  
City of Brunswick v. Aetna Indem-  
nity Co., 217.  
City of Chicago v. Allcock, 228.  
City of Chicago v. Davies, 138,  
150.  
City of Chicago v. Elzeman, 101.  
City of Chicago v. Greer, 352.  
City of Chicago v. Hesing, 456,  
457.  
City of Chicago v. Huenerbein, 108,  
505.  
City of Chicago v. Jones, 101.  
City of Chicago v. Keefe, 451.  
City of Chicago v. Langlass, 101,  
313.  
City of Chicago v. Leseth, 343.  
City of Chicago v. McCulloch, 476.  
City of Chicago v. McLean, 150,  
158.  
City of Chicago v. Major, 429, 456.  
City of Chicago v. Martin, 316.  
City of Chicago v. People, 237.  
City of Chicago v. Powers, 476.  
City of Chicago v. Scholten, 429,  
456, 457, 482, 489.  
City of Chicago v. Tebbetts, 228.  
City of Cincinnati v. Evans, 109.  
City of Cincinnati v. Steadman,  
133.  
City of Dallas v. Allen, 277.  
City of Delphi v. Lowery, 474.

[The figures refer to pages]

- City of El Reno v. Cullinane, 217.  
 City of Elwood v. Addison, 451.  
 City of Eufaula v. Simmons, 123.  
 City of Eureka v. Merrifield, 422.  
 City of Galesburg v. Higley, 342.  
 City of Galesburg v. Rahn, 95.  
 City of Galveston v. Barbour, 154, 430, 438, 451.  
 City of Garrett v. Winterich, 97, 98.  
 City of Indianapolis v. Gaston, 102, 138.  
 City of Indianola v. Gulf, W. T. & P. Ry., 221.  
 City of Jeffersonville v. Patterson, 285.  
 City of Joliet v. Conway, 101.  
 City of Joliet v. Weston, 458.  
 City of Lincoln v. Smith, 60.  
 City of Logansport v. Justice, 102.  
 City of Lowell v. Parker, 191.  
 City of Lowell v. Short, 312.  
 City of Madison v. American Sanitary Engineering Co., 217.  
 City of Madisonville v. Hardman, 505.  
 City of Montreal v. Labelle, 432.  
 City of New Britain v. New Britain Tel. Co., 209.  
 City of Omaha v. Richards, 486.  
 City of Ottawa v. Sweely, 342.  
 City of Ottumwa v. Parks, 136.  
 City of Pekin v. Reynolds, 237.  
 City of Pueblo v. Timbers, 309.  
 City of Ripon v. Bittel, 130.  
 City of Salem v. Harvey, 458, 468.  
 City of Salina v. Trosper, 150.  
 City of San Antonio v. Lane, 265.  
 City of Sandwich v. Dolan, 138.  
 City of Toledo v. Goulden, 133.  
 City of Vicksburg v. McLain, 458, 482.  
 City of Wabash v. Carver, 474.  
 Claiborne v. Chesapeake & O. R. Co., 309.  
 Clapp v. Minneapolis & St. L. R. Co., 444.  
 Claridge v. Tramway Co., 190.  
 Clark v. American Exp. Co., 37, 374.  
 Clark v. Bales, 321.  
 Clark v. Barnard, 203.  
 Clark v. Boyreau, 496.  
 Clark v. Chambers, 47, 66.  
 Clark v. Dales, 246.  
 Clark v. Dutton, 235.  
 Clark v. Famous Shoe & Clothing Co., 19.  
 Clark v. Fisher, 519.  
 Clark v. Huber, 193.  
 Clark v. Iowa City, 265.  
 Clark v. Kay, 220.  
 Clark v. Marsiglia, 94.  
 Clark v. Moore, 84.  
 Clark v. Mumford, 136.  
 Clark v. Newsam, 312.  
 Clark v. New York, N. H. & H. R. Co., 190.  
 Clark v. North American Co., 320.  
 Clark v. Pinney, 288, 295, 357.  
 Clark v. Reese, 527.  
 Clark v. Whitaker, 253, 282.  
 Clark v. Zeigler, 517.  
 Clarke v. Meigs, 8.  
 Cleary v. City R. Co., 431.  
 Clegg v. Dearden, 119, 121.  
 Cleghorn v. New York Cent. & H. R. R. Co., 325.  
 Clement v. Cash, 197, 198, 218, 217, 218.  
 Clement v. Spear, 252.  
 Clements v. Schuykill River E. S. R. Co., 213.  
 Cleveland v. Sterrett, 356.  
 Cleveland, C., C. & St. L. R. Co. v. Kensley, 385.  
 Cleveland, C., C. & St. L. R. Co. v. King, 505.  
 Cleveland, C., C. & St. L. R. Co. v. Kinsley, 164.  
 Cleveland, C., C. & St. L. R. Co. v. Miles, 451.  
 Cleveland, C., C. & St. L. R. Co. v. Quillen, 380.  
 Cleveland, C., C. & St. L. R. Co. v. Stewart, 148.  
 Cleveland City R. Co. v. Conner, 383.  
 Cleveland & P. R. Co. v. Rowan, 430, 438.  
 Clifton v. Hooper, 38.  
 Clinton v. Laning, 154.  
 Clissold v. Machell, 319.  
 Close v. Crossland, 368.  
 Close v. Fields, 228, 230.  
 Cloy v. Western Union Tel. Co., 419.  
 Clune v. Ristine, 480.  
 Coates v. Burlington, C. R. & N. R. Co., 476.  
 Cobb v. Illinois Cent. R. Co., 81, 82, 377.  
 Cobb v. People, 319.  
 Cobb v. Smith, 119, 122.  
 Cobb v. Standish, 60.  
 Coburn v. Litchfield, 519.  
 Cochran v. Miller, 314.  
 Cochran v. Tuttle, 315.  
 Cochran v. Quackenbush, 55.  
 Cochran v. Tuttle, 339.  
 Cockburn v. Ashland Lumber Co., 71, 272, 356, 361.

[The figures refer to pages]

- Cocke v. Western Union Tel. Co., 419.  
 Cockrell v. Proctor, 514.  
 Codman v. Evans, 507.  
 Cody v. Lowry, 311.  
 Coffeyville Mining & Gas Co. v. Carter, 444, 446.  
 Coffin v. Varila, 152.  
 Cogdell v. Yett, 44.  
 Coggs v. Bernard, 10.  
 Cogswell v. New York, N. H. & H. R. Co., 17.  
 Cogswell v. West. St. & N. E. Electric R. Co., 343.  
 Cogswell's Heirs v. Lyon, 238.  
 Cohen v. St. Louis R. Co., 256.  
 Cohn v. Norton, 48, 510.  
 Coil v. Wallace, 524, 531.  
 Coit v. Western Union Tel. Co., 387.  
 Coker v. Brevard, 208.  
 Cole v. Bickelhaupt, 508.  
 Cole v. Gray, 141, 311.  
 Cole v. Hoeburg, 331.  
 Cole v. Ross, 281, 300.  
 Cole v. Tucker, 323.  
 Coleman v. Allen, 153, 319.  
 Coleman v. Ballard's Heirs, 516.  
 Coleman v. Clark, 514.  
 Coleman v. Lytle, 13, 25.  
 Coleman v. New York & N. H. R. Co., 46.  
 Coles v. Kelsey, 238.  
 Coley v. Statesville, 465.  
 Collard v. Southeastern R. Co., 47, 74, 375.  
 Collier v. Betterton, 212.  
 Collins v. Council Bluffs, 317, 348, 349.  
 Collins v. Davidson, 429.  
 Collins v. Delaporte, 351.  
 Collins v. Dodge, 102.  
 Collins v. East Tennessee, V. & G. R. Co., 437.  
 Collins v. Mack, 162.  
 Collins v. Stephens, 48.  
 Colonna Dry Dock Co. v. Colonna, 218.  
 Colorado Coal & Iron Co. v. Lamb, 465.  
 Colorado Consol. Land & Water Co. v. Hartman, 502.  
 Colorado Springs & I. R. Co. v. Nichols, 47.  
 Colt v. Owens, 290.  
 Colton v. Dunham, 298.  
 Columbus, H. V. & T. R. Co. v. Gardner, 506.  
 Colwell v. Foulks, 212.  
 Combs v. Scott, 510.  
 Comer v. Knowles, 177.  
 Commerce, The, 342.  
 Commercial Club of Indianapolis v. Hilliker, 431.  
 Commercial & Agricultural Bank v. Jones, 253, 282.  
 Com. v. Boston & M. R. Co., 239.  
 Commonwealth of Virginia v. State, 285.  
 Compta, The, 373, 374.  
 Conant v. Griffin, 429, 433, 482.  
 Condict v. Grand Trunk R. Co., 63.  
 Condon v. Kemper, 202.  
 Condon v. Railroad Co., 452.  
 Congdon v. Scale Co., 187.  
 Conger v. Weaver, 511.  
 Conklin v. Hancock, 513.  
 Conn v. Penn., 259.  
 Connaughton v. Sun Printing & Publishing Ass'n, 486.  
 Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co., 265.  
 Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 422, 423.  
 Connell v. Western Union Tel. Co., 140, 166.  
 Connelly v. McNeil, 341.  
 Connersville Wagon Co. v. McFarlon Carriage Co., 110.  
 Connor v. Hillier, 276.  
 Connor v. New York, 488.  
 Connoss v. Meir, 331.  
 Conqueror, The, 273, 275.  
 Conroy v. Flint, 185.  
 Conroy v. Pittsburgh Times, 182.  
 Consequa v. Fanning, 231.  
 Consolidated Coal Co. of St. Louis v. Block & Hartman Smelting Co., 359.  
 Consolidated Coal Co. of St. Louis v. Scheiber, 132.  
 Consolidated Home Supply Ditch & Reservoir Co. v. Hamlin, 505.  
 Consolidated Stone Co. v. Morgan, 481.  
 Consolidated Traction Co. v. Hone, 439.  
 Cook v. Beale, 345.  
 Cook v. Brandeis, 355.  
 Cook v. Clay St. Hill R. Co., 431.  
 Cook v. Ellis, 303, 320, 323.  
 Cook v. Finch, 218, 219.  
 Cook v. Fowler, 227, 259, 261.  
 Cook v. Garza, 321.  
 Cook v. Hull, 31.  
 Cook v. Loomis, 282.  
 Cooke v. Barr, 38.  
 Cooke v. England, 117, 122.  
 Coolidge v. Neat, 522, 523, 525.  
 Cooper v. Hart, 25.  
 Cooper v. Lake Shore & M. S. R. Co., 458, 459, 476, 477.

[The figures refer to pages]

- Cooper v. Randall, 122, 190.  
 Coover v. Moore, 436.  
 Copeland v. Cunningham, 135.  
 Coppin v. Braithwaite, 156.  
 Corbett v. Oregon Short Line R. Co., 457.  
 Corcoran v. Harran, 152, 176, 323, 348.  
 Corcoran v. Judson, 135.  
 Corley v. Lancaster, 23.  
 Cornell v. Jackson, 513.  
 Corning v. Corning, 330.  
 Cornwall v. Mills, 478.  
 Corrigan v. Trenton Delaware Falls Co., 267.  
 Corsair, The, 422.  
 Cort v. Ambergate, N. & B. & E. J. R. Co., 353.  
 Cortelyou v. Lansing, 288.  
 Corwin v. Walton, 323.  
 Cory v. Silcox, 21, 33.  
 Cory v. Thames Iron Works & Ship Bldg. Co., 76, 360, 361.  
 Coryell v. Colbaugh, 7, 317, 524, 531.  
 Costello v. District of Columbia, 234, 260.  
 Costigan v. Mohawk & H. R. R. Co., 94.  
 Cotheal v. Talmage, 209, 213, 214, 217.  
 Cothran v. Hanover Nat. Bank, 276.  
 Cothran v. Western Union Tel. Co., 399.  
 Cotter v. Plumer, 501.  
 Coulter v. Pine Tp., 480.  
 Countryman v. Fonda, J. & G. R. Co., 470.  
 Courtois v. Carpentier, 232.  
 Courtoy v. Dozier, 156.  
 Covington St. R. Co. v. Packer, 154.  
 Cowan v. Western Union Tel. Co., 44, 63, 64, 100, 165.  
 Cowden v. Wright, 154.  
 Cowen v. Winters, 326.  
 Cowley v. Davidson, 30, 254, 333.  
 Cox v. Birmingham Ry., Light & Power Co., 316.  
 Cox v. Crumley, 321.  
 Cox v. Long, 363.  
 Cox v. McLoughlin, 248.  
 Cox v. Vanderkleed, 152, 171.  
 Cox's Adm'rs v. Henry, 516.  
 Coy v. Indianapolis Gas Co., 44.  
 Crabb's Ex'rs v. Nashville Bank, 330.  
 Craig v. Cook, 321, 347, 504.  
 Craig v. McHenry, 191.  
 Crain v. Beach, 117.  
 Craker v. Chicago & N. W. R. Co., 152, 172, 305, 328.  
 Cram v. Bailey, 192.  
 Cram v. Hadley, 341.  
 Cramer v. Lepper, 266.  
 Crampton v. Valido Marble Co., 282.  
 Crane v. Peer, 221, 222.  
 Crane Elevator Co. v. Lippert, 47.  
 Cranor Smith Lumber Co. v. Frith, 93, 98.  
 Crater v. Binnering, 55.  
 Crawford v. Andrews, 33.  
 Crawford v. Bergen, 37.  
 Crawford v. Simonton's Ex'rs, 238.  
 Crawson v. Western Union Tel. Co., 141, 166.  
 Crisdee v. Bolton, 197.  
 Crittenden v. Posey, 368.  
 Croco v. Oregon Short-Line R. Co., 333.  
 Crogan v. Schiele, 339.  
 Cromwell v. Sac County, 260.  
 Crone v. Dawson, 232.  
 Cropper v. Nelson, 299.  
 Crosby v. Humphreys, 176, 320.  
 Crosier v. Craig, 522.  
 Cross v. Guthery, 422.  
 Crouch v. Railway Co., 370.  
 Crow v. State, 230.  
 Cruikshank v. Gordon, 178.  
 Crumb v. Oaks, 282.  
 Crutcher v. Choctaw, O. & G. R. Co., 85, 376.  
 Crux v. Aldred, 212.  
 Culin v. Woodbury Glass Works, 359.  
 Cullity v. Dorfriel, 514.  
 Culmer v. Caine, 249.  
 Cumberland Coal & Iron Co. v. Tilghman, 191.  
 Cumberland Telephone & Telegraph Co. v. Anderson, 461, 465.  
 Cumberland Telephone & Telegraph Co. v. Poston, 321.  
 Cumberland Telephone & Telegraph Co. v. United Electric R. Co., 27.  
 Cumberland & O. Canal Corp. v. Hitchings, 119, 120, 505.  
 Cummings v. Burleson, 135.  
 Cummings v. Dudley, 300.  
 Cummings v. Howard, 259.  
 Curd v. Letcher, 258.  
 Currie v. White, 246.  
 Currier v. Davis, 298.  
 Currier v. Swan, 174, 315.  
 Curry v. Larer, 218.  
 Curry v. Sandusky Flak Co., 494.  
 Curtis v. Brewer, 212.  
 Curtis v. Innerarity, 235.  
 Curtis v. McNair, 182.

[The figures refer to pages]

- Curtis v. Rochester & S. R. Co., 138, 335.  
 Curtis v. Sioux City & H. P. R. Co., 157.  
 Curtiss v. Hoyt, 321.  
 Curtiss v. Lawrence, 330.  
 Cushing v. Drew, 203, 211.  
 Cushing v. Seymour, Sabin & Co., 112.  
 Cushing v. Wells, 298.  
 Cushman v. Hayes, 294.  
 Cushman v. Ryan, 17.  
 Custis v. Adkins, 235.  
 Cutler v. James Goold Co., 281.  
 Cutler v. Smith, 313, 317, 321, 349, 504.  
 Cutter v. New York, 231.  
 Cutter v. Waddingham, 193.  
 Cutting v. Grand Trunk R. Co., 6, 374.  
 Cutting v. Seabury, 422.  
 Cutts v. Western Union Tel. Co., 400.
- D**
- Dady v. Condit, 246.  
 Dagenham Dock Co., In re, 216.  
 Daggett v. Pratt, 220.  
 Daggett v. Wallace, 163, 524.  
 Dahill v. Booker, 192.  
 Dailey v. Crowley, 185.  
 Dailey v. Dismal Swamp Canal Co., 119.  
 Dailey v. Green, 364.  
 Dailey v. Litchfield, 216, 218.  
 Dakin v. Williams, 211.  
 Dallam v. Fittler, 188.  
 Dallas v. Allen, 277.  
 Dallas & W. R. Co. v. Spicker, 445.  
 Dalton v. Beers, 309, 315, 321.  
 Dalton v. Bowker, 136.  
 Dalton v. South Eastern R. Co., 439, 463.  
 Daly v. Van Benthuyssen, 320.  
 Damron v. Roach, 503.  
 Dana v. Fiedler, 230, 243, 246, 352, 356.  
 Danforth v. Walker, 351.  
 Danforth v. Williams, 238.  
 Daniel v. Holland, 232.  
 Daniel v. New York News Pub. Co., 22.  
 Daniel v. Western Union Tel. Co., 80, 413.  
 Daniell v. Sinclair, 263.  
 Daniels v. Ballantine, 62, 64.  
 Daniels v. Brown, 193.  
 Daniels v. Osborn, 354.  
 Daniels v. Ward, 260, 262.  
 Daniels v. Wilson, 224.  
 Danziger v. Boyd, 496, 497.
- Darley Main Colliery Co. v. Mitchell, 113, 116.  
 Dart v. Laimbeer, 111.  
 Dash v. Van Kleeck, 2.  
 D. A. Tompkins Co. v. Monticello Cotton Oil Co., 74.  
 Daughtery v. American Union Tel. Co., 48, 73, 80, 395, 414, 417.  
 Davenport v. Bradley, 329.  
 Davenport v. Wells, 300.  
 David v. Conard, 330.  
 David Reeves, The, 433.  
 Davidson v. Grunsolly, 191.  
 Davidson v. Southern Pac. Co., 149.  
 Davidson Benedict Co. v. Stevenson, 437.  
 Davidson Development Co. v. Southern R. Co., 75, 375.  
 Davis v. Bowers Granite Co., 329, 347.  
 Davis v. Cincinnati, H. & D. R. Co., 110.  
 Davis v. Doe ex dem. Delpit, 494.  
 Davis v. Dudley, 60.  
 Davis v. Fairclough, 282.  
 Davis v. Fish, 89.  
 Davis v. Freeman, 207, 220.  
 Davis v. Greely, 228, 231.  
 Davis v. Guarnieri, 481.  
 Davis v. Hamilton, 181.  
 Davis v. Hendrie, 262.  
 Davis v. Holy Terror Min. Co., 65, 67.  
 Davis v. Logan, 498.  
 Davis v. Marxhausen, 179.  
 Davis v. Railroad Co., 377.  
 Davis v. Rider, 262.  
 Davis v. Seeley, 334.  
 Davis v. Slagle, 526.  
 Davis v. Smith, 265.  
 Davis v. Tacoma Ry. & Power Co., 144.  
 Davis v. Talcott, 81.  
 Davis v. U. S., 198, 208.  
 Davis v. Western Union Tel. Co., 419.  
 Davis v. Yuba County, 224.  
 Day v. Brownrigg, 9.  
 Day v. New York Cent. R. Co., 248.  
 Day v. Poole, 363.  
 Day v. Woodworth, 7, 134, 301, 303.  
 Dayton v. Hooglund, 364.  
 Deal v. D. M. Osborne & Co., 192.  
 Dean v. Blackwell, 7.  
 Dean v. Chicago & N. W. R. Co., 255.  
 Deane v. O'Brien, 330.  
 De Bernales v. Fuller, 226.  
 De Briar v. Minturn, 339.

[The figures refer to pages]

- Decker v. Mathews, 275.  
 Deck's Adm'r v. Feld, 276.  
 De Clerq v. Mungin, 287.  
 De Costa v. Massachusetts Flat Water & Min. Co., 103.  
 De Geofroy v. Merchants' Bridge Terminal R. Co., 123, 128.  
 De Graff Vrieling & Co. v. Wickham, 212.  
 De Groff v. American Linen-Thread Co., 211.  
 De Havilland v. Bowerbank, 226, 227.  
 Deinshee v. Standard Oil Co., 250.  
 Deisen v. Chicago, St. P., M. & O. R. Co., 477.  
 Deitzler v. Wilhite, 496.  
 Delano v. Curtis, 185.  
 Delany's Adm'rs v. Hill, 276.  
 Delatouche v. Chubb, 497.  
 De Lavalette v. Wendt, 230.  
 Delavergue v. Norris, 519.  
 Delaware, L. & W. R. Co. v. Burson, 256.  
 Delaware, L. & W. R. Co. v. Devore, 131.  
 Delaware, L. & W. R. Co. v. Jones, 449, 450.  
 Delaware & H. Canal Co. v. Torrey, 32, 35.  
 Delaware & R. Canal Co. v. Wright, 122.  
 Dellone v. Hull, 354.  
 Demann v. Elgth Ave. R. Co., 150.  
 Demarest v. Little, 470, 472, 473, 486.  
 Deming v. Grand Trunk R. Co., 362, 375.  
 Dempsey v. Schawacker, 237.  
 Denn ex dem. Delatouche v. Chubb, 497.  
 Dennis v. Barber, 281, 321.  
 Dennis v. Cummins, 210, 215.  
 Dennis v. Maxfield, 111.  
 Dennis v. Nearfield, 113.  
 Dennis v. Stoughton, 61.  
 Denniston v. Imbrie, 259, 265.  
 Denny v. New York Cent. R. Co., 56, 62.  
 Denslow v. Van Horn, 8, 526, 528, 529.  
 Densmore v. Mathews, 192.  
 Dent v. Davison, 32.  
 Dent v. Dunn, 227.  
 Denver Brick & Mfg. Co. v. McAlister, 267.  
 Denver City Irr. & Water Co. v. Middaugh, 119.  
 Denver City Tramway Co. v. Martin, 149.  
 Denver, S. P. & P. R. Co. v. Conway, 228.  
 Denver, S. P. & P. R. Co. v. Frame, 278.  
 Denver, S. P. & P. R. Co. v. Woodward, 425.  
 Denver & R. G. R. Co. v. Gunning, 426.  
 Denver & R. G. R. Co. v. Spencer, 426, 472, 473, 487.  
 Derrick v. Jones, 329.  
 Derry v. Flitner, 55.  
 De Rutte v. New York, Albany & Buffalo Electric Magnetic Tel. Co., 386, 387, 389.  
 De Steiger v. Hannibal & St. J. R. Co., 228, 254.  
 Detroit Daily Post Co. v. McArthur, 153, 172.  
 Detzur v. B. Stroh Brewing Co., 348.  
 Devaughn v. Heath, 321, 349.  
 Devendorf v. Wert, 35.  
 Devendorf v. West, 30.  
 Devereux v. Buckley, 375.  
 Devereux v. Burgwin, 229.  
 Deverill v. Burnell, 221.  
 Devine v. Edwards, 228.  
 Devine v. Keowin, 247.  
 Devine v. Lewis, 515.  
 Devlin v. New York, 77, 231, 361.  
 De Voegler v. Western Union Tel. Co., 161, 169, 402.  
 Dewint v. Wiltse, 81.  
 De Witt v. Morris, 185.  
 Dexter v. Spear, 40.  
 Deyo v. Van Valkenburgh, 33.  
 Deyo v. Waggoner, 55.  
 Dibble v. Morris, 313.  
 Diblin v. Murphy, 348.  
 Dickens v. New York Cent. R. Co., 484, 489.  
 Dickerson v. Finley, 73, 74, 77.  
 Dickinson v. Barber, 22.  
 Dickson v. Surginer, 229.  
 Diebold v. Sharp, 426.  
 Digges v. Norris, 331.  
 Dike v. Greene, 221.  
 Dillahunt v. Little Rock & Ft. S. R. Co., 519.  
 Dillenback v. Jerome, 281.  
 Dillon v. Hunt, 187.  
 Dimick v. Campbell, 331.  
 Dimmey v. Wheeling & M. G. R. Co., 448, 481, 487.  
 Dimmick v. Lockwood, 518.  
 Dimock v. United States Nat. Bank, 294.  
 Dingle v. Hare, 365.  
 Dirmeyer v. O'Hern, 145, 172.  
 Disbrow v. Westchester Hardware Co., 501.

[The figures refer to pages]

- Dixon v. Caldwell, 281.  
 Dixon v. Clow, 14, 32.  
 Dixon v. Parkes, 231.  
 Doane v. Chicago City R. Co., 202, 208.  
 Doane v. Dunham, 364.  
 Dobbins v. Baker, 495.  
 Dobbins v. Duquid, 81, 519.  
 Dobbins v. Higgins, 235.  
 Dobenspeck v. Armel, 246.  
 Dodd Grocery Co. v. Postal Tel. Cable Co., 394.  
 Dodge v. Essex County Com'rs, 16.  
 Dodge v. Perkins, 233.  
 Dodson v. Cooper, 186, 251.  
 Dody v. Condit, 510.  
 Doe v. Davis, 497.  
 Doe v. Filliter, 302, 497.  
 Doe v. Hare, 495.  
 Doe v. Huddart, 497.  
 Doe v. Vallejo, 267.  
 Doe v. Warren, 264, 267.  
 Doe ex dem. Trustees of Augusta v. Perkins, 497.  
 Doellner v. Tynan, 17.  
 Doerhoefer v. Shewmaker, 309, 323, 324.  
 Doig v. Barkley, 260.  
 Dole v. Lyon, 181.  
 Dole v. New England Mut. Marine Ins. Co., 43.  
 Donahoe v. Emery, 518.  
 Donahoe v. Wabash, St. L. & P. R. Co., 19.  
 Donahue v. Partridge, 235, 249.  
 Donaldson v. Mississippi & M. R. Co., 433, 436, 476.  
 Donnell v. Jones, 55, 319, 336.  
 Donnelly v. Hufschmidt, 132.  
 Donner v. Redenbaugh, 511.  
 Donoghue v. Hayes, 22.  
 Doods v. Hakes, 109.  
 Dooley v. Smith, 296.  
 Dooley v. Watson, 221.  
 Doremus v. Howard, 354.  
 Doremus' Estate, In re, 231.  
 Dorgan v. Telegraph Co., 404.  
 Dority v. Dunning, 119.  
 Dorman v. Broadway R. Co. of Brooklyn, 430.  
 Dorrab v. Illinois Cent. R. Co., 157, 321.  
 Dorsey v. Moore, 190.  
 D'Orval v. Hunt, 31, 139.  
 Dothage v. Stuart, 496.  
 Dotterer v. Bennett, 229.  
 Doubet v. Kirkman, 529.  
 Dougherty v. Miller, 238.  
 Douglas v. Gausman, 523, 524.  
 Douglass v. Kraft, 281.  
 Douglass v. Ohio River R. Co., 30.  
 Dovan v. Seattle, 128.  
 Dovelaar v. Milwaukee, 131.  
 Dow v. Humbert, 184.  
 Dow v. Jullen, 313.  
 Dow v. Winnepesaukee Gas & Electric Co., 66.  
 Dowell v. Griswold, 239.  
 Downer v. Whittier, 260.  
 Downey v. Beach, 262.  
 Dox v. Dey, 229.  
 Doyle v. Burns, 294, 295.  
 Doyle v. Edwards, 348.  
 Drake v. Chicago, R. I. & P. R. Co., 502.  
 Drake v. Kiely, 61.  
 Draper v. Baker, 176.  
 Draper v. Tucker, 461.  
 Dresser v. Blair, 176.  
 Dresser v. Dresser, 113.  
 Dressler v. Davis, 330.  
 Drew v. Beall, 511.  
 Drew v. Pedlar, 216.  
 Driess v. Frederick, 46.  
 Driggers v. Bell, 246.  
 Driggs v. Dwight, 337.  
 Driver v. Western Union R. Co., 99.  
 Drohn v. Brewer, 313, 319.  
 Du Belloit v. Lord Waterpark, 227.  
 Dubois v. Hermance, 135, 136.  
 Duckworth v. Johnson, 452, 488.  
 Dudley v. Reynolds, 261.  
 Duffy v. Dubuque, 348.  
 Duffy v. Shockey, 203, 211.  
 Dufort v. Abadie, 153.  
 Duggan v. Baltimore & O. R. Co., 152.  
 Duggleby Bros. v. Lewis Roofing Co., 64.  
 Duke v. Missouri Pac. R. Co., 100.  
 Dullaghan v. Fitch, 209.  
 Duncan v. Tanner, 509.  
 Duncan v. Western Union Tel. Co., 399.  
 Dunkirk Colliery Co. v. Lever, 352.  
 Dunlap v. Wagner, 67.  
 Dunlay v. Wiseman, 265.  
 Dunlop v. Gregory, 211.  
 Dunlop v. Grote, 351.  
 Dunn v. Barnes, 298.  
 Dunn v. Burlington, C. R. & N. R. Co., 342.  
 Dunn v. Hannibal & St. J. R. Co., 371, 375.  
 Dunn v. Morgenthau, 209, 212.  
 Dunn v. Western Union Tel. Co., 145.  
 Dunnica v. Sharp, 511.  
 Dunning v. Reid, 75.  
 Dunshee v. Geoghegan, 509.  
 Dunshee v. Standard Oil Co., 234.  
 Dupont v. McAdow, 529, 531.  
 Dural v. Hunt, 465.

[The figures refer to pages]

Duran v. Ayer, 259.  
Duran v. Ansonia, 16.  
Durfee v. Newkirk, 308.  
Durham v. Commercial Nat. Bank, 253.  
Durkee v. Central Pac. R. Co., 154.  
Durkes v. Union, 348.  
Durst v. Swift, 210, 214.  
Duryee v. New York, 122, 123, 251, 254.  
Dush v. Fitzhugh, 315.  
Dustan v. McAndrew, 355.  
Dutro v. Wilson, 190.  
Duval v. Davey, 175.  
Duval v. Hunt, 443, 471.  
Dwiggins v. Clark, 352.  
Dwight v. Elmira, O. & N. R. Co., 500, 501.  
Dwinel v. Brown, 196, 197.  
Dwyer v. Chicago, St. P. M. & O. R. Co., 436.  
Dyar v. Slingerland, 267.  
Dyas v. Southern Pac. Co., 431.  
Dye v. Denham, 316, 348.  
Dygart v. Bradley, 28.

E

Eagan v. New York Transp. Co., 113, 115.  
Eakin v. Scott, 215.  
Eames v. Brattleboro, 101.  
Eames v. Texas & N. O. R. Co., 67.  
Earl v. Tupper, 134.  
Earle v. Holderness, 184.  
Earl of Leicester v. Walter, 182.  
East Line & R. R. Ry. Co. v. Smith, 442.  
Eastman v. Amoskeag Mfg. Co., 17.  
Eastman v. Sanborn, 90.  
East Moline Co. v. Weir Plow Co., 36, 217.  
Easton v. Pennsylvania & O. Canal Co., 209, 214.  
East Tennessee, V. & G. R. Co. v. Gurley, 437.  
East Tennessee, V. & G. R. Co. v. Lockhart, 46, 164.  
East Tennessee, V. & G. R. Co. v. Mitchell, 437.  
East Tennessee, V. & G. R. Co. v. Staub, 99.  
East Tennessee, V. & G. R. Co. v. Toppins, 437.  
Eatman v. Railway Co., 309.  
Eaton v. Bell, 265.  
Eaton v. Boissonnault, 259.  
Eaton v. Boston, C. & M. R. Co., 49.  
Eaton v. Langley, 283.  
Eaton v. Lyman, 32, 36.  
Eberly v. Rupp, 25.

Echols v. Louisville & N. R. Co., 273.  
Eckert v. Long Island R. Co., 19.  
Economy Light & Power Co. v. Sheridan, 340.  
Economy Light & Power Co. v. Stephen, 487.  
Eddowes v. Hopkins, 228.  
Eddy v. Coffin, 510.  
Eddy v. Harris, 381.  
Eden v. Lexington & F. R. Co., 422.  
Edmondson v. Moberly, 17.  
Edmondson v. Nuttall, 183.  
Edsall v. Howell, 500.  
Edwards v. Beebe, 118.  
Edwards v. Leavitt, 323.  
Edwards v. Ricks, 311.  
Edwards v. San Jose Printing & Pub. Soc., 181.  
Edwards v. Wiester, 329.  
E. E. Bolles Wooden Ware Co. v. U. S., 283, 501.  
Eells v. Chesapeake & O. R. Co., 126, 128.  
E. E. Thomas Fruit Co. v. Start, 183.  
Ege v. Kille, 494.  
Eginoire v. Union County, 468.  
Ehrgott v. New York, 56, 66.  
Ehrman v. Brooklyn City R. Co., 343.  
Einolf v. Thomson, 345.  
Eisele v. Oddie, 333.  
Eisenlohr v. Swain, 108.  
Ekins v. East India Co., 253.  
Ela v. Card, 516.  
Elbin v. Wilson, 314.  
Elbinger Actien-Gesellschaft fur Fabrication von Eisenbahn Materiel v. Armstrong, 76, 82, 84, 361.  
Eldridge v. Gorman, 500.  
Elizabethtown & P. R. Co. v. Geoghegan, 209.  
Eller v. Carolina & N. W. R. Co., 159.  
Ellet v. Paxson, 512.  
Ellington v. Bennett, 270, 499.  
Elliott v. Beeson, 267.  
Elliott v. Herz, 813.  
Elliott v. Missouri Pac. R. Co., 189.  
Elliott v. Van Buren, 46, 320, 323.  
Ellis v. Cleveland, 57, 61, 68.  
Ellis v. Hilton, 90.  
Ellis v. Iowa City, 16.  
Ellis v. State ex rel. James, 338.  
Ellis v. Wire, 294.  
Ellsworth v. Chicago, B. & Q. R. Co., 382.  
Elmer v. Fessenden, 187.



[The figures refer to pages]

- Elvins v. Delaware & A. Telegraph & Tel. Co., 192.  
 Ely v. Edison Electric Illuminating Co., 189.  
 Ely v. Parsons, 36, 38.  
 Emblen v. Myers, 7, 314.  
 Embrey v. Owen, 21, 32, 38.  
 Emerson v. Atwater, 265.  
 Emerson v. Cochran, 25.  
 Emery v. Boyle, 209.  
 Emery v. Lowell, 41, 140, 505.  
 Emily, The, 370.  
 Emily Souder, The, 298.  
 Emmons v. Westfield Bank, 273.  
 Empire Gold Min. Co. v. Bonanza Gold Min. Co., 32.  
 Empire Mill Co. v. Lovell, 188.  
 Emrich v. Ireland, 494.  
 Enders v. Board of Public Works, 246, 295.  
 Enders v. Skannal, 144.  
 English v. Spokane Commission Co., 367.  
 Enlow v. Hawkins, 50, 53.  
 Enos v. Cole, 36.  
 Enright v. American Belgian Lamp Co., 77.  
 Erickson v. Brooklyn Heights R. Co., 343.  
 Erickson v. Green, 212.  
 Erie City Iron Works v. Barber, 55, 112.  
 Erie R. Co. v. Lockwood, 254, 372.  
 Erie Telegraph & Telephone Co. v. Grimes, 410.  
 Erie & P. R. Co. v. Douthet, 273.  
 Erwin v. Neversink Steamboat Co., 476, 478, 484.  
 Esher v. Mineral R. & Min. Co., 438.  
 Esmond v. Van Benschoten, 215.  
 Espy v. Jones, 525, 529.  
 Eten v. Lutster, 45.  
 Etnyre v. McDaniel, 260.  
 Eureka Fertilizer Co. of Cecil County v. Baltimore Copper, Smelting & Rolling Co., 187.  
 Evans v. Cincinnati, S. & M. R. Co., 111.  
 Evans v. Harries, 336.  
 Evans v. Huntington, 343.  
 Evans v. Kymer, 275.  
 Evans v. St. Louis, I. M. & S. R. Co., 66.  
 Evans v. Western Union Tel. Co., 393, 408.  
 Everett v. Akins, 347.  
 Evertson v. Sawyer, 347.  
 Evison v. Cramer, 324, 328.  
 Ewalt v. Gray, 495.  
 Ewart v. Kerr, 287.  
 E. W. Bliss Co. v. Buffalo Tin Can Co., 359.  
 Ewen v. Chicago & N. W. R. Co., 440, 457, 459, 475, 490, 491.  
 Ewing v. Blount, 281, 292.  
 Ewing v. Pittsburgh, C. & St. L. R. Co., 12, 143, 147.
- F**
- Fabbri v. Kalbfleisch, 298.  
 Fagnan v. Knox, 153.  
 Fail v. Western Union Tel. Co., 165.  
 Fail's Adm'r v. Presley's Adm'r, 254.  
 Fail & Miles v. McRee, 117.  
 Fairbanks v. Kerr, 62.  
 Fairbanks v. Witter, 134.  
 Fairchild v. California Stage Co., 149, 170.  
 Fairfax v. New York Cent. & H. R. R. Co., 278.  
 Fajardo v. New York Cent. & H. R. R. Co., 442.  
 Fake v. Eddy's Ex'r, 231.  
 Falk v. Fletcher, 281.  
 Falk v. Waterman, 134.  
 Falkenau v. Rowland, 489.  
 Falsom v. Apple River Log-Driving Co., 500.  
 Falvey v. Stanford, 346.  
 Farris v. Lewis, 56.  
 Farley v. Gate City Gas Light Co., 506.  
 Farman v. Lauman, 323.  
 Farmers' Bank v. Reynolds, 224.  
 Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. R. Co., 486.  
 Farnham v. Ross, 212.  
 Farrand v. Aldrich, 153, 172, 178, 182.  
 Farrel v. Colwell, 269.  
 Farrell v. Chicago R. I. & P. R. Co., 477, 486.  
 Farwell v. Davis, 377.  
 Farwell v. Warren, 312, 315, 317, 341, 349.  
 Faulkner v. Closter, 37.  
 Faulkner v. Hart, 371.  
 Fauntleroy v. Hannibal, 232, 265.  
 Favor v. Philbrick, 377.  
 Fay v. Guynon, 117.  
 Fay v. Haven, 32.  
 Fay v. Parker, 303, 306, 310, 323.  
 Fay v. Swan, 152, 172.  
 Feeney v. Long Island R. Co., 102.  
 Feeter v. Heath, 248.  
 Fell v. Union Pac. R. Co., 250, 251.  
 Felton v. Fuller, 186.  
 Felton v. Spiro, 446.  
 Fenelon v. Butts, 152.

[The figures refer to pages]

- Ferguson v. Davis Co., 150.  
 Ferguson v. Ferguson, 118.  
 Ferguson v. Hosier, 365.  
 Fergusson v. Anglo-American Tel. Co., 411.  
 Ferrer v. Western Union Tel. Co., 408, 411.  
 Ferris v. Comstock, 110.  
 Fessler v. Love, 356, 357, 360.  
 Fessman v. Seeley, 213.  
 Fetter v. Beal, 114.  
 Fidelity Land & Imp. Co. v. Buzard, 460, 465.  
 Fidler v. McKinley, 526.  
 Field v. Insurance Co. of North America, 236.  
 Fields v. Lancaster Cotton Mills, 311.  
 Filer v. New York Cent. R. Co., 113.  
 Fillebrown v. Hoar, 159.  
 Filliter v. Phippard, 4.  
 Final v. Backus, 3, 281.  
 Finch v. Northern Pac. R. Co., 157.  
 Finley v. Hershey, 121, 502, 505.  
 Finn v. Western R. Corp., 190.  
 Finney v. Smith, 133, 184, 309.  
 First Ecclesiastical Soc. of Suffield v. Loomis, 259.  
 First Nat. Bank v. Minneapolis & N. Elevator Co., 293, 295.  
 First Nat. Bank v. Red River Valley Nat. Bank, 293, 295.  
 First Nat. Bank v. St. Cloud, 100.  
 First Nat. Bank v. Strang, 276, 282.  
 First Nat. Bank v. Western Union Tel. Co., 389, 404, 413.  
 First Nat. Bank v. Williams, 135.  
 First Orthodox Congregational Church of Middleville, Trustees of, v. Walrath, 217.  
 Fish v. Dodge, 330.  
 Fish v. Folley, 117.  
 Fishburne v. Engledove, 504.  
 Fishell v. Winans, 246.  
 Fisher v. Bidwell, 214, 236.  
 Fisher v. Boston, 18.  
 Fisher v. Brown, 191, 294.  
 Fisher v. Goebel, 520.  
 Fisher v. Hamilton, 153.  
 Fisher v. Jansen, 102.  
 Fisher v. Naysmith, 500.  
 Fisher v. Otis, 262.  
 Fisher v. Prince, 183.  
 Fisher v. Sargent, 229.  
 Fisher v. Western Union Tel. Co., 398.  
 Fisk v. Fowler, 203.  
 Fiske v. Fiske, 118.  
 Fitzgerald v. Caldwell, 258.  
 Fitzgerald v. Chicago, R. I. & P. R. Co., 171, 314, 384, 385.  
 Fitzhugh v. McPherson, 264, 267.  
 Fitzhugh v. Wiman, 191.  
 Fitzpatrick v. Cottingham, 214, 218.  
 Flaherty v. New York, N. H. & H. R. Co., 464, 465, 487.  
 Flanagan v. Womack, 311, 324.  
 Flanders v. Chicago, St. P., M. & O. R. Co., 343.  
 Flanders v. Tweed, 132.  
 Flannery v. Anderson, 228.  
 Flannery v. Baltimore & O. R. Co., 317, 326, 349.  
 Fleet v. Hollenkemp, 314.  
 Fleetford v. Barnett, 526.  
 Fleischner v. Pacific Postal Telegraph Cable Co., 397.  
 Fleming v. Beck, 6.  
 Fleming v. Label, 148.  
 Flemming v. Ball, 17.  
 Fletcher v. Dyche, 212.  
 Fletcher v. Rylands, 27.  
 Fletcher v. Tayleur, 81, 362.  
 Flick v. Wetherbee, 111.  
 Flinn v. Barber, 235.  
 Flori v. St. Louis, 64.  
 Florida Cent. & P. R. Co. v. Foxworth, 429, 432, 436, 443, 471, 472.  
 Florida Cent. & P. R. Co. v. Sullivan, 471.  
 Floyd v. Hamilton, 319.  
 Fludyer v. Cocker, 512.  
 Flureau v. Thornhill, 510.  
 Flynn v. Fogarty, 154.  
 Fohrman v. Consolidated Traction Co., 325.  
 Foley v. Everett, 138.  
 Foley v. McKeegan, 206, 218.  
 Folsom v. Apple River Log-Driving Co., 502.  
 Folsom v. McDonough, 212.  
 Fondavilla v. Jourgensen, 109.  
 Foote v. Blanchard, 235.  
 Foote v. Burlington Water Co., 505.  
 Foote v. Sprague, 220.  
 Foppiano v. Baker, 435, 457.  
 Forbes v. Boston & L. R. Co., 282, 372.  
 Forbes v. Loftin, 132.  
 Force v. Elizabeth, 266.  
 Ford v. Cheever, 308.  
 Ford v. Chicago & N. W. R. Co., 119.  
 Ford v. Fargason, 7, 318.  
 Ford v. Jones, 152, 172.  
 Ford v. Monroe, 422.  
 Ford v. Roberts, 282.  
 Ford v. Williams, 186.

[The figures refer to pages]

- Fordyce v. Culver, 343.  
 Fordyce v. McCants, 464, 468.  
 Foreman v. Western Union Tel. Co., 165, 168.  
 Forman v. Forman, 264.  
 Forney v. Geldmacher, 64, 67.  
 Forstall v. Consolidated Ass'n of Planters of Louisiana, 265.  
 Forster v. Forster, 260.  
 Forsyth v. Palmer, 186.  
 Forsyth v. Wells, 4, 283, 501.  
 Fort v. Oradoff, 80.  
 Ft. Scott, W. & W. R. Co. v. Lightburn, 335.  
 Ft. Smith S. R. Co. v. Maledon, 93.  
 Ft. Worth & D. C. R. Co. v. Burton, 12.  
 Ft. Worth & D. C. R. Co. v. Hogsett, 502.  
 Ft. Worth & D. C. R. Co. v. Robertson, 131.  
 Ft. Worth & N. O. R. Co. v. Wallace, 502.  
 Fosdick v. Greene, 295.  
 Foster v. Adams, 355.  
 Foster v. Dodd, 157.  
 Foster v. Rodgers, 275.  
 Fotheringham v. Adams Exp. Co., 156.  
 Foulger v. Newcomb, 336.  
 Fowle v. New Haven & Northampton Co., 122, 127, 505.  
 Fowler v. Buffalo Furnace Co., 476.  
 Fowler v. Davenport, 254.  
 Fowler v. Fowler, 180.  
 Fowler v. Gilman, 191.  
 Fowler v. Merrill, 281.  
 Fowler v. Owen, 185.  
 Fox v. Boston & M. R. Co., 79.  
 Fox v. Harding, 6, 111, 361.  
 Fox v. Oakland Consol. St. Ry., 486.  
 Fox v. Railroad Co., 362.  
 Fox v. Stevens, 322.  
 Fox v. Wunderlich, 317, 349.  
 Foxall v. Barnett, 137.  
 Foxcraft v. Nagle, 259.  
 Foy v. Troy & B. R. Co., 3.  
 Fraloff v. New York Cent. & H. R. Co., 254.  
 France v. Gaudet, 48, 363.  
 France, The, 343.  
 Francis v. St. Louis Transfer Co., 60, 382.  
 Francis v. Schoellkopf, 33, 505, 507.  
 Francis v. Western Union Tel. Co., 160, 162, 166, 169.  
 Frank v. Colhoun, 298.  
 Franke v. St. Louis, 459.  
 Franklin v. Railroad Co., 463.  
 Franklin Coal Co. v. McMillan, 501.  
 Franklin Printing & Publishing Co. v. Behrens, 335.  
 Fraser v. Berkley, 176.  
 Fraser v. Echo Mining & Smelting Co., 31.  
 Fraser v. Little, 195.  
 Frazer v. Bigelow Carpet Co., 243, 252, 255.  
 Frazer v. Smith, 79.  
 Frazer v. Western Union Tel. Co., 401.  
 Frazier v. Bigelow Carpet Co., 255.  
 Frazier v. Simmons, 354.  
 Frederick v. Marquette, H. & O. R. Co., 383.  
 Fredericksen v. Singer Mfg. Co., 176.  
 Fredonia Gas Co. v. Bailey, 107.  
 Freeman v. Western Union Tel. Co., 396.  
 Freese v. Orary, 31, 334.  
 Freese v. Tripp, 154, 325.  
 Frei v. Vogel, 191.  
 French v. Connecticut River Lumber Co., 107.  
 French v. French, 232.  
 French v. Ramage, 36, 37.  
 Freund v. Murray, 9.  
 Frey v. Drahos, 191.  
 Freyman v. Knecht, 365.  
 Frick v. Kansas City, 506.  
 Fried v. New York Cent. R. Co., 3.  
 Friend v. Dunks, 155.  
 Frink v. Coe, 314.  
 Frohreich v. Gammon, 65, 365, 367.  
 Frolick v. Independent Glass Co., 358.  
 Frost v. Jordon, 135.  
 Fry v. Bennett, 324.  
 Fry v. Dubuque & S. W. R. Co., 103, 138.  
 Fry v. Hillan, 150.  
 Frye v. Maine Cent. R. Co., 111.  
 Fuchs v. Koerner, 94.  
 Fullam v. Stearns, 33.  
 Fuitts v. Wycoff, 112.  
 Funk v. Buck, 262.  
 Furlong v. Polleys, 272, 358, 360.  
 Furnace Co. v. Willins Mfg. Co., 212.  
 Furnas v. Durgin, 516.  
 Furstenburg v. Fawsett, 74.

## G

- Gagnier v. Fargo, 335.  
 Gahan v. Western Union Tel. Co., 166.  
 Gainesford v. Carroll, 91, 356.  
 Gaither v. Blowers, 152, 316.

[The figures refer to pages]

- Gale v. Leckie, 111.  
 Galena & C. U. R. Co. v. Appleby, 331.  
 Galena & C. U. R. Co. v. Rae, 370.  
 Galena & S. W. R. Co. v. Ennor, 294.  
 Galigher v. Jones, 291, 292.  
 Gallagher v. Bowie, 150.  
 Gallatin & N. Turnpike Co. v. Fry, 192.  
 Gallena v. Hot Springs R. Co., 156.  
 Gallo v. McAndrews, 214.  
 Gallup v. Perue, 249.  
 Galsworthy v. Strutt, 211.  
 Galveston, H. & S. A. R. Co. v. Donahoe, 328.  
 Galveston, H. & S. A. R. Co. v. Ford, 442.  
 Galveston, H. & S. A. R. Co. v. Hughes, 465.  
 Galveston, H. & S. A. R. Co. v. Le Glerse, 435.  
 Galveston, H. & S. A. R. Co. v. Matula, 430.  
 Galveston, H. & S. A. R. Co. v. Parr, 502.  
 Galveston, H. & S. A. R. Co. v. Porfert, 150.  
 Galveston, H. & S. A. R. Co. v. Wesch, 343.  
 Gamache v. Johnston Tin Foll & Metal Co., 441, 448.  
 Gamble v. Mullin, 68.  
 Gammon v. Abrams, 248.  
 Gammon v. Howe, 210.  
 Gannon v. Widman, 498.  
 Ganong v. Green, 192.  
 Ganson v. Madigan, 351, 354.  
 Gardner v. Barnett, 259.  
 Gardner v. Heartt, 192.  
 Gardner v. Tatum, 348.  
 Garland v. Wholeham, 323.  
 Garnier v. Squires, 177.  
 Garrard v. Dawson, 253.  
 Garretson v. Becker, 153.  
 Garretson v. Brown, 190.  
 Garvin v. Gates, 91.  
 Gaskins v. Davis, 283, 501.  
 Gaslight Co. v. Rome, W. & O. R. Co., 497.  
 Gaslight & Coke Co. v. Vestry of St. Mary Abbott's, 16.  
 Gates v. Bekins, 159.  
 Gates v. Burlington, C. R. & M. R. Co., 43.  
 Gates v. Reynolds, 511.  
 Gattson v. Tolley, 497.  
 Gatzow v. Buening, 140, 159, 318.  
 Gautier v. English, 331.  
 Gay v. Winter, 439, 492.  
 Gay Mfg. Co. v. Camp, 215.  
 Geary v. Metropolitan St. R. Co., 442, 481.  
 Gee v. Railroad Co., 74, 78, 362, 376.  
 Geiger v. Payne, 522.  
 Gelger v. Western Maryland R. Co., 209.  
 Gelsmann v. Missouri-Edison Electric Co., 487.  
 Gelpcke v. Dubuque, 265.  
 Genet v. Kissam, 280.  
 Genin v. Ingersoll, 264, 267.  
 George and Richard, The, 55.  
 George v. Lane, 47, 64.  
 George D. Mashburn & Co. v. Dannenberg Co., 293.  
 George R. Barse Livestock Commission Co. v. McKinster, 272, 283, 291.  
 Georgetown, B. & L. R. Co. v. Eagles, 54.  
 Georgia v. Kepford, 51, 58, 67.  
 Georgia R. Co. v. Homer, 156.  
 Georgia R. R. v. Olds, 321.  
 Georgia R. R. v. Pittman, 477.  
 Georgia R. & Banking Co. v. Garr, 481.  
 Georgia R. & Banking Co. v. Oaks, 425, 477.  
 Georgia R. & Electric Co. v. Baker, 11, 143, 170, 385.  
 Gerock v. Western Union Tel. Co., 170.  
 Gerriah v. New Market Mfg. Co., 33, 188.  
 Gest v. City of Cincinnati, 238.  
 Ghen v. Rich, 282.  
 Gibbs v. Chase, 185, 186.  
 Gibbs v. Chisolm, 266.  
 Gibbs v. Fremont, 232, 236.  
 Gibbs v. Gildersleeve, 374, 377.  
 Gilbert v. Washington City, V. M. & G. S. R. Co., 266.  
 Gibson v. Cincinnati Enquirer, 239.  
 Gibson v. Fischer, 109.  
 Gibson v. Humphrey, 184.  
 Gibson v. Talbotton R. Co., 348.  
 Giddens v. Western Union Tel. Co., 141.  
 Giese v. Schultz, 163, 172, 524.  
 Gilbert v. Berkinshaw, 344.  
 Gilbert v. Burtenshaw, 345.  
 Gile v. Stevens, 33.  
 Giles v. O'Toole, 109.  
 Gilkerson-Sloss Commission Co. v. Yale, 133.  
 Gill v. Rochester & P. R. Co. 456.  
 Gillespie v. New York, 231.  
 Gillett v. Western R. Corp., 90.  
 Gillies v. Wofford, 253.  
 Gilman v. Andrews, 285, 294, 357.  
 Gilman v. Brown, 500, 504.

[The figures refer to pages]

- Gilman v. Florida Cent. & P. R. Co. 318.  
 Gilman v. Gilman, 497.  
 Gilman v. Noyes, 53, 54.  
 Gilmore v. Driscoll, 502.  
 Gilpins v. Consequa, 229.  
 Gilson v. Delaware & H. Canal Co., 53.  
 Girard v. Taggart, 352.  
 Givens v. Van Studdiford, 505.  
 Glasgow v. Metropolitan St. R. Co., 95.  
 Glaspy v. Cabot, 272, 283.  
 Glasscock v. Shell, 523.  
 Gleason v. Briggs, 236.  
 Gleason v. Gary, 507.  
 Gleason v. Pinney, 300.  
 Gleen v. Western Union Tel. Co., 141.  
 Glenn v. Philadelphia & W. C. Traction Co., 130.  
 Glenn v. Western Union Tel. Co., 144, 166.  
 Glidden v. Pooler, 366.  
 Globe Ref. Co. v. Cotton Oil Co., 361.  
 Gloucester Grammar School Case, 17.  
 Glynn v. Moran, 215.  
 Gobble v. Linder, 210.  
 Goddard v. Foster, 248.  
 Goddard v. Grand Trunk R. of Canada, 7, 155, 157, 326, 327.  
 Goddard v. Westcott, 318, 523, 531.  
 Godeau v. Blood, 151, 171.  
 Godwin v. McGehee, 258.  
 Goetz v. Ambs, 313, 317, 342, 349.  
 Goff v. Inhabitants of Rehoboth, 247.  
 Gohen v. Texas Pac. R. Co., 435.  
 Gold v. Ives, 38.  
 Gold Hunter, The, 254.  
 Goldsmith's Adm'r v. Joy, 174, 176, 177.  
 Gomez v. Joyce, 153.  
 Goodall v. Thurman, 524.  
 Goodbar v. Lindsey, 132.  
 Goodchap v. Roberts, 259.  
 Goodhart v. Pennsylvania R. Co., 130, 137, 139.  
 Gooding v. Shea, 192.  
 Goodman v. Wolf, 510.  
 Goodno v. Oshkosh, 102, 188, 150, 171, 342.  
 Goodnow v. Willard, 33.  
 Goodpaster v. Porter, 512.  
 Goodsell v. Hartford & N. H. R. Co., 437.  
 Goodson v. Stewart, 311.  
 Goodtitle v. Tombs, 494.  
 Goodwine v. Kelley, 512.  
 Gorden v. Gorden, 498.  
 Gordon v. Brewster, 93, 318.  
 Gordon v. Norris, 351, 352.  
 Gordon v. Swan, 226.  
 Gores v. Graff, 447.  
 Gorham v. New York Cent. & H. R. R. Co., 456.  
 Gorman v. Minneapolis & St. L. R. Co., 476.  
 Gorman v. Southern Pac. Co., 157.  
 Goslin v. Corry, 116, 119.  
 Goss v. Missouri Pac. R. Co., 429.  
 Gossage v. Philadelphia B. & W. R. Co., 112.  
 Gould v. Bishop Hill Colony, 220, 262.  
 Gove v. Watson, 185.  
 Gower v. Carter, 262.  
 Gower v. Saltmarsh, 218.  
 Grable v. Margrave, 175, 303, 315, 316, 322.  
 Grace v. Dempsey, 177.  
 Grace v. McArthur, 178.  
 Graessle v. Carpenter, 503.  
 Graham v. Consolidated Traction Co., 465.  
 Graham v. Maitland, 272.  
 Graham v. Pacific R. Co., 316, 317, 348.  
 Grand Rapids Booming Co. v. Jarvis, 50.  
 Grand Rapids & Bay City R. Co. v. Van Deusen, 117.  
 Grand Tower Min. Mfg. & Transp. Co. v. Phillips, 91, 204, 272, 378.  
 Grand Trunk R. Co. v. Ruel, 432.  
 Grand Trunk R. Co. of Canada v. Jennings, 479, 480.  
 Grant v. Healey, 299.  
 Grant v. King, 253, 282.  
 Grant v. Ludlow's Adm'r, 3.  
 Grant v. Pratt & Lambert, 219.  
 Grant v. Tallman, 517, 518, 519.  
 Grant v. Union Pac. R. Co., 138.  
 Grant v. Wiley, 522, 525.  
 Grasselli v. Lowden, 211.  
 Grass Valley Quartz Min. Co. v. Stackhouse, 330.  
 Graver v. Sholl, 30, 32.  
 Graves v. Glass, 98.  
 Graves v. Moore, 135, 136.  
 Gray v. Briscoe, 262.  
 Gray v. Central R. Co. of New Jersey, 246, 351.  
 Gray v. Crosby, 220, 221.  
 Gray v. Elzroth, 181.  
 Gray v. Grant, 302.  
 Gray v. Little, 433.  
 Gray v. McDonald, 435.  
 Gray v. Missouri River Packet Co., 371.  
 Gray v. Portland Bank, 294.  
 Gray v. St. Paul City R. Co., 486.

[The figures refer to pages]

- Gray v. Van Amringe, 247.  
 Grayson v. St. Louis Transit Co., 12, 143.  
 Great Western R. Co. of Canada v. Miller, 328.  
 Grebert-Borgnis v. Nugent, 82, 84, 361.  
 Greeley, S. L. & P. R. Co. v. Yeager, 308.  
 Green v. Biddle, 496.  
 Green v. Boston & L. R. Co., 278.  
 Green v. Button, 25.  
 Green v. Catawba Power Co., 138.  
 Green v. Clark, 191.  
 Green v. Craig, 313, 320.  
 Green v. Edick, 193.  
 Green v. Garcia, 254.  
 Green v. Goddard, 105.  
 Green v. Hudson River R. Co., 422, 423, 430.  
 Green v. J. A. Shoemaker & Co., 12.  
 Green v. Macy, 37.  
 Green v. Mann, 97.  
 Green v. Price, 211.  
 Green v. Southern Pac. Co., 431, 474.  
 Green v. Spencer, 8.  
 Green v. Sperry, 184.  
 Green v. T. A. Shuemaker & Co., 147.  
 Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co., 56, 63, 65.  
 Greene v. Williams, 108.  
 Greeney v. Pennsylvania Water Co., 334.  
 Greenfield Bank v. Leavitt, 294.  
 Greenfield Sav. Bank v. Simons, 251.  
 Greenish v. Standard Sugar Refinery, 258.  
 Greenleaf v. McColley, 531.  
 Greenvault v. Davis, 513.  
 Greenville & C. R. Co. v. Partlow, 321.  
 Greer v. New York, 189.  
 Greer v. Tweed, 212.  
 Gregg v. Bank of Columbia, 293.  
 Gregg v. Fitzsough, 285, 294.  
 Gregory v. Chambers, 136.  
 Greshman v. Taylor, 110.  
 Gries v. Zeck, 182.  
 Griffey v. Kennard, 495.  
 Griffin v. Brown, 136.  
 Griffin v. Colver, 4, 100, 103, 104, 106, 360, 400.  
 Griffin v. Wilcox, 2, 3.  
 Griffith v. Blockwater Boom & Lumber Co., 90.  
 Griffith v. Burden, 276.  
 Griffith v. Dodgson, 329.  
 Griffith v. Owensboro & N. R. Co., 496.  
 Griggs v. Fleckenstein, 53, 61.  
 Grimes v. Blake, 264.  
 Grindle v. Eastern Exp. Co., 81, 88, 377.  
 Gring v. Lerch, 524.  
 Griswold v. New York Cent. & H. R. Co., 102.  
 Griswold v. Sabin, 512.  
 Grocers' Nat. Bank v. Clark, 3.  
 Grogan v. Broadway Foundry Co., 456.  
 Grohmann v. Kirschman, 319.  
 Gronan v. Kukkuck, 152, 176, 335.  
 Groover v. Warfield, 190.  
 Grose v. Hennessey, 368.  
 Grosso v. Delaware, L. & W. R. Co., 423.  
 Grotenkemper v. Harris, 471, 473.  
 Gruman v. Smith, 290.  
 Grund v. Pendergast, 370.  
 Grund v. Van Vleck, 324.  
 Guengerech v. Smith, 316.  
 Guengerich v. Smith, 323.  
 Guetzkow Bros. Co. v. Andrews, 74, 82, 84, 361.  
 Guiding Star, The, 373.  
 Guetman v. Davis, 299.  
 Guild v. Guild, 133.  
 Guille v. Swan, 62.  
 Gulf, C. & S. F. R. Co. v. Campbell, 133.  
 Gulf, C. & S. F. R. Co. v. Compton, 460, 477.  
 Gulf, C. & S. F. R. Co. v. Dickens, 151.  
 Gulf, C. & S. F. R. Co. v. Finley, 430.  
 Gulf, C. & S. F. R. Co. v. Hayter, 143, 147.  
 Gulf, C. & S. F. R. Co. v. Helsley, 505.  
 Gulf, C. & S. F. R. Co. v. Hodge, 97.  
 Gulf, C. & S. F. R. Co. v. Hurley, 162.  
 Gulf, C. & S. F. R. Co. v. John, 442.  
 Gulf, C. & S. F. R. Co. v. Johnson, 486.  
 Gulf, C. & S. F. R. Co. v. Levy, 164, 420.  
 Gulf, C. & S. F. R. Co. v. Loonie, 394, 410, 418.  
 Gulf, C. & S. F. R. Co. v. McGowan, 502.  
 Gulf, C. & S. F. R. Co. v. McManewitz, 97.  
 Gulf, C. & S. F. R. Co. v. Richards, 506.

[The figures refer to pages]

- Gulf, C. & S. F. R. Co. v. Southwick, 439, 449.  
 Gulf, C. & S. F. R. Co. v. Steele, 27.  
 Gulf, C. & S. F. R. Co. v. Trott, 12, 159.  
 Gulf, C. & S. F. R. Co. v. Younger, 481.  
 Gulliver v. Fowler, 519.  
 Gully v. Remy, 220.  
 Gunderson v. Northwestern Elevator Co., 458.  
 Gunn v. Head, 264.  
 Gunter v. Astor, 107.  
 Guptill v. Verback, 528.  
 Gustafson v. Wind, 334.  
 Guthrie v. Pugsley, 513.  
 Guthrie v. Russell, 519.  
 Guthrie v. Wickliffs, 238.  
 Gutta Percha & Rubber Mfg. Co. v. Benedict, 235.  
 Gwin v. Breedlove, 296.  
 Gwinn v. Whitaker's Adm'x, 238.  
 Gwynn v. Citizens' Tel. Co., 315.
- ### H
- Haas v. Metz, 143.  
 Habig v. Parker, 329.  
 Hack v. Dady, 67, 143, 146, 147, 151.  
 Hackenberry v. Shaw, 220.  
 Hackett v. B. C. & M. R. R. Co., 373.  
 Hadley v. Baxendale, 47, 64, 71, 73, 74, 76, 77, 78, 80, 81, 86, 359, 376, 379, 391, 400, 403, 412, 415.  
 Hadley v. Western Union Tel. Co., 408.  
 Hadsell v. Hancock, 136.  
 Hagan v. Providence & W. R. Co., 7, 157, 328.  
 Hagan v. Riley, 136.  
 Hager v. Blake, 261, 264.  
 Haggerty v. Central R. Co., 425.  
 Hagood v. Aikin, 238.  
 Hahn v. Bettingen, 523, 524.  
 Hahn v. Concordia Society of Baltimore City, 221.  
 Hahn v. Cummings, 511.  
 Hahn v. Horstman, 212, 214.  
 Haight v. Hayt, 3.  
 Haile's Curator v. Texas & P. R. Co., 142, 147.  
 Haines v. Pearson, 429, 430, 443, 476.  
 Haines v. Schultz, 305, 320.  
 Hair v. Barnes, 108.  
 Hale v. Bonner, 163.  
 Hale v. Chard Union, 505.  
 Hale v. Lawrence, 18.  
 Hales v. Railroad Co., 79, 375, 377.  
 Haley v. Mobile & O. R. Co., 434.  
 Hall v. Chicago, B. & N. R. Co., 342.  
 Hall v. Crowley, 212.  
 Hall v. Dean, 518.  
 Hall v. Douglass, 309.  
 Hall v. Galveston, H. & S. A. R. Co., 466.  
 Hall v. Hall, 239, 329.  
 Hall v. Huckins, 235.  
 Hall v. Manson, 143.  
 Hall v. North Pacific Coast R. Co., 487.  
 Hallam v. Post Pub. Co., 182.  
 Hallett v. Novion, 229.  
 Halley v. Gregg, 181.  
 Hallock v. Slater, 218.  
 Hallum v. Dickinson, 239.  
 Halstead v. Nelson, 102, 134.  
 Hamer v. Hathaway, 230, 253, 282.  
 Hamer v. Kirkwood, 228.  
 Hamilton v. Eno, 153.  
 Hamilton v. Ganyard, 246.  
 Hamilton v. Jones, 424.  
 Hamilton v. Kilpatrick, 319.  
 Hamilton v. Le Grange, 257.  
 Hamilton v. McPherson, 370.  
 Hamilton v. Magill, 47, 81.  
 Hamilton v. Moore, 204.  
 Hamilton v. Railroad Co., 305.  
 Hamilton v. Third Ave. R. Co., 157, 314, 382, 384, 385.  
 Hamilton v. Van Rensselaer, 231, 260.  
 Hamilton v. Vicksburg, S. & P. R. Co., 16, 17.  
 Hamilton v. Western N. C. R. Co., 362.  
 Hamlin v. Great Northern R. Co., 139, 170, 338, 380.  
 Hammer v. Breidenbach, 218.  
 Hammer v. Schoenfelder, 75, 82, 360.  
 Hammer v. Wilsey, 185.  
 Hammond v. Bussey, 50, 77, 367.  
 Hammond v. Hamin, 511.  
 Hammond v. Schiff, 187.  
 Hampton v. Jones, 57, 61, 68.  
 Hancock v. Franklin Ins. Co., 297.  
 Hancock v. Hubbell, 32.  
 Hancock v. Western Union Tel. Co., 144, 165, 170.  
 Hand v. Armstrong, 260.  
 Hand v. Church, 247, 248.  
 Handley v. Chambers, 229.  
 Handy v. Johnson, 156.  
 Haney Mfg. Co. v. Perkins, 22.  
 Haniford v. Kansas, 150.  
 Hanley v. Sutherland, 339.  
 Hanna v. Mills, 354.  
 Hanna v. Sweeney, 319.

[The figures refer to pages]

- Hannibal & St. J. R. Co. v. Martin, 149, 170.  
 Hanover Water Co. v. Ashland Iron Co., 120.  
 Hansley v. Jamesville & W. R. Co., 313.  
 Hanson v. European & N. A. R. Co., 328, 327, 382.  
 Hardeman v. Turner, 496.  
 Hardenbergh v. St. Paul, M. & M. R. Co., 342.  
 Harder v. Harder, 508.  
 Harding v. Larkin, 136, 515, 516.  
 Harding v. Townshend, 187, 480.  
 Hardy v. Boston & M. R. R., 240, 242.  
 Hardy v. Minneapolis & St. L. R. Co., 429.  
 Hardy v. Nelson, 516.  
 Hare v. Marsh, 316.  
 Harger v. McMains, 321.  
 Hargrave v. Penrod, 331.  
 Hargreaves v. Kimberly, 119, 122.  
 Hargrove v. Creighton, 299.  
 Harlow v. Thomas, 517, 518.  
 Harman v. Cundiff, 315, 320.  
 Harmon v. Thompson, 512.  
 Harmony v. Bingham, 213.  
 Harndon v. Stultz, 132.  
 Harness v. Steele, 319.  
 Harper v. Ely, 235, 265.  
 Harper Furniture Co. v. Southern Exp. Co., 74, 78, 81, 85.  
 Harrington v. Bean, 517.  
 Harrington v. Glenn, 238.  
 Harrington v. Murphy, 518.  
 Harris v. Eldred, 186.  
 Harris v. Jaffray, 330.  
 Harris v. Kerr, 37.  
 Harris v. Louisville, N. O. & T. R. Co., 345.  
 Harris v. Panama R. Co., 272.  
 Harrison v. Cage, 523.  
 Harrison v. Charlton, 285, 294.  
 Harrison v. Ely, 305, 319.  
 Harrison v. Kiser, 503.  
 Harrison v. Missouri Pac. R. Co., 88.  
 Harrison v. Swift, 163, 522, 523.  
 Harshman v. Northern Pac. R. Co., 422.  
 Harshman v. Rose, 333.  
 Hart v. Charlotte, C. & A. R. Co., 90, 326.  
 Hartford & Salisbury Ore Co. v. Miller, 185, 514.  
 Hartshorn v. B., C. R. & N. R. Co., 256.  
 Harvey v. Connecticut & P. R. R. Co., 370, 377.  
 Harvey v. Dunlop, 27.  
 Harvey v. Hamilton, 246.  
 Harvey v. Mason City & Ft. D. R. Co., 126, 127.  
 Harvey v. Snow, 494.  
 Hasbrouck v. Tappen, 210, 213.  
 Hasbrouck v. Western Union Tel. Co., 397.  
 Haskell v. Hunter, 353.  
 Haskins v. Lumsden, 181.  
 Hastings v. Stetson, 153, 171.  
 Hastings v. Wiswall, 267.  
 Hatch v. Fuller, 172.  
 Hatch v. Vermont Cent. R. Co., 16.  
 Hatchell v. Chandler, 320.  
 Hatcher v. Pelham, 282.  
 Hatfield v. Central R. Co., 505.  
 Hathaway v. Lynn, 211, 218.  
 Hathorne v. Stinson, 35.  
 Hattin v. Chapman, 524.  
 Hauleman v. Turner, 494.  
 Hauser v. Griffith, 323.  
 Hauxhurst v. Hovey, 235.  
 Havana, R. & E. R. Co. v. Walsh, 341.  
 Havemeyer v. Cunningham, 92.  
 Haven v. Beidler Mfg. Co., 37.  
 Haven v. Wakefield, 81.  
 Haverly v. State Line & S. R. Co., 50.  
 Haverstick v. Erie Gas Co., 183.  
 Hawes v. Knowles, 152, 312.  
 Hawes v. Woolcock, 298.  
 Hawk v. Anderson, 329.  
 Hawk v. Ridgway, 156, 316, 317, 348.  
 Hawkins v. Front St. Cable R. Co., 130.  
 Hawley v. Hodge, 131.  
 Hay v. Commonwealth, 256.  
 Hay v. Reid, 180.  
 Hayden v. Anderson, 191.  
 Hayden v. Bartlett, 253.  
 Hayden v. Demets, 354, 355.  
 Hayden v. Fair Haven & W. R. Co., 334.  
 Hayes v. Chicago, M. & St. P. R. Co., 231, 256.  
 Hayes v. Massachusetts Mut. Life Ins. Co., 276.  
 Hayes v. Southern R. Co., 312.  
 Hayes v. Todd, 178.  
 Hayner v. Cowden, 315, 316.  
 Haynes v. Erk, 343.  
 Hays v. Creary, 152.  
 Hays v. Houston G. N. R. Co., 156, 328.  
 Hayward v. Cain, 187.  
 Hayward v. Newton, 345.  
 Hazard v. Israel, 325.  
 Head v. Becklenberg, 277.  
 Head v. Georgia Pac. R. Co., 142, 158.  
 Healy v. Fallon, 240, 246.



[The figures refer to pages]

- Healy v. Gilman, 265.  
 Heard v. Bowers, 213.  
 Heater v. Pearce, 36.  
 Heaver v. Lanahan, 186.  
 Hecht v. Harrison, 37.  
 Hedden v. Schneblin, 64, 71, 75.  
 Heddles v. Chicago & N. W. R. Co., 151.  
 Hedrick v. Ilwaco Ry. & Nav. Co., 462.  
 Hegeman v. Western R. Corp., 348.  
 Heidenheimer v. Ellis, 230.  
 Heil v. Glanding, 316.  
 Hellbroner v. Douglass, 295.  
 Heimbürg v. Ismay, 511.  
 Heirn v. McCaughan, 379, 380.  
 Heiser v. Loomis, 338.  
 Hellams v. Western Union Tel. Co., 419.  
 Hendershot v. Western Union Tel. Co., 391, 398.  
 Henderson v. Cansler, 204.  
 Henderson v. Chaires, 498.  
 Henderson v. Laurens, 266.  
 Henderson v. McReynolds, 177.  
 Henderson v. Squire, 136.  
 Henderson v. Stainton, 329.  
 Henderson-Boyd Lumber Co. v. Cook, 209.  
 Hendler v. Quigley, 104.  
 Hendrickson v. Anderson, 93.  
 Hendrickson v. Bock, 368.  
 Hendrickson v. Kingsbury, 323.  
 Hendrie v. Neelon, 273.  
 Henkes v. Minneapolis, 60.  
 Henkle v. Schaub, 21.  
 Henly v. Lyme, 23.  
 Henneshots v. Gallagher, 511.  
 Hennessy v. Bavarian Brewing Co., 424.  
 Hennessy v. Metzger, 212.  
 Henning v. Van Tyne, 239.  
 Hennion's Ex'rs v. Jacobus, 235.  
 Henry v. Davis, 133, 204.  
 Henry v. Flagg, 267.  
 Henry v. Ohio River R. Co., 126, 127.  
 Henry v. Thompson, 262.  
 Hepburn v. Griswold, 296.  
 Hepburn v. Sewell, 253.  
 Herb v. Metropolitan Hospital & Dispensary, 517.  
 Herbert v. Hardenbergh, 329.  
 Herbert v. Railway Co., 262.  
 Herbert v. Rainey, 505.  
 Herington v. Clark, 515.  
 Herndon v. Venable, 511.  
 Herreshoff v. Tripp, 497.  
 Herring v. Skaggs, 365, 367.  
 Herron v. Western Union Tel. Co., 393, 395, 408.  
 Hersey v. Walsh, 275.  
 Hershey v. Hershey, 266.  
 Hess v. American Pipe Mfg. Co., 12, 143.  
 Hetherington v. Railroad Co., 463, 466.  
 Hewitt v. John Week Lumber Co., 248.  
 Hewlett v. George, 152, 156, 177, 178.  
 Hewson-Herzog Supply Co. v. Minnesota Brick Co., 4, 356.  
 Hexter v. Knox, 81, 109.  
 Heyer v. Carr, 186.  
 Heyer v. Salisbury, 474.  
 Heywood v. Heywood, 300.  
 H. G. Holloway & Bro. v. White Dunham Shoe Co., 77, 79, 83.  
 Hibbard v. Western Union Tel. Co., 14, 33, 389, 404.  
 Hichborn, Mack & Co. v. Bradley, 100, 108.  
 Hickman v. Haynes, 358.  
 Hickman v. Missouri Pac. R. Co., 458.  
 Hicks v. Blakeman, 496.  
 Hicks v. Drew, 187.  
 Hicks v. Foster, 132.  
 Hicks v. Newport, A. H. R. Co., 480.  
 Higbie v. Farr, 218.  
 Higgins v. Butcher, 421.  
 Higgins v. Dewey, 66.  
 Higgins v. Railroad Co., 321.  
 Higgins v. Sargent, 225, 226, 227, 236.  
 Higginson v. Weld, 217, 370.  
 Hingley v. First Nat. Bank of Beverly, 238.  
 Hildreth v. Thompson, 499.  
 Hill v. Maupin, 8.  
 Hill v. Myers, 497.  
 Hill v. New Orleans, O. & G. W. R. Co., 328.  
 Hill v. Smith, 358.  
 Hill v. Taylor, 177.  
 Hill v. Union R. Co., 138.  
 Hill v. Wertheimer-Swartz Shoe Co., 214.  
 Hill v. Western Union Tel. Co., 414.  
 Hillhouse v. Mix, 193.  
 Hinchman v. Patterson Horse R. Co., 17.  
 Hinckley v. Beckwith, 81, 109.  
 Hinckley v. Pittsburgh Bessemer Steel Co., 353.  
 Hinde v. Liddell, 82, 91, 359.  
 Hiner v. Richter, 510.  
 Hinton v. Sparkes, 215.  
 Hintz v. Graupner, 182.  
 Hirschkovitz v. Pennsylvania R. Co., 482, 487.

[The figures refer to pages]

- Hitchcock v. Harrington, 499.  
Hitt v. Allen, 228.  
Hively v. Webster County, 469.  
Hixon v. Hixon, 300.  
Hoadley v. International Paper Co., 448.  
Hoadley v. Northern Transp. Co., 62, 64, 66.  
Hoadley v. Watson, 134, 309.  
Hoagland v. Segur, 211, 218, 219.  
Hoare v. Allen, 259.  
Hoback v. Kilgore, 509.  
Hobbs v. London & S. W. R. Co., 5, 50, 51, 60, 170, 378.  
Hobbs' Case, 379.  
Hobson v. Thellusson, 33.  
Hobson v. Trevor, 221.  
Hodapp v. Sharp, 347.  
Hodgdon v. Hodgdon, 238.  
Hodges, Ex parte, 214.  
Hodges v. Fries, 519.  
Hodges v. King, 214, 222.  
Hodges v. Thayer, 513.  
Hodgkins v. Price, 495, 496.  
Hodgson v. Millward, 317.  
Hoey v. Felton, 54.  
Hoffman v. Chamberlain, 357, 368.  
Hoffman v. Northern Pac. R. Co., 156.  
Hogan v. Kyle, 512.  
Hogg v. Manufacturing Co., 230.  
Hogg v. Pinckney, 153.  
Hogue v. Chicago & A. R. Co., 442.  
Holbrook v. Griffin, 505.  
Holbrook v. Tobey, 211.  
Holden v. Freeman's Sav. & Tr. Co., 260.  
Holdfast v. Shephard, 193.  
Holland v. Brown, 438.  
Holland v. Worley, 270.  
Hollingsworth v. Detroit, 265.  
Hollis v. Western Union Tel. Co., 398.  
Holloway v. Griffith, 523, 528.  
Holloway v. Miller, 515.  
Holloway v. Stephens, 80.  
Hollyday v. The David Reeves, 433.  
Holmes v. Blyler, 177.  
Holmes v. Davis, 189.  
Holmes v. Halde, 102.  
Holmes v. Jones, 348.  
Holmes v. Mather, 28.  
Holmes v. Oregon & O. R. Co., 433.  
Holmes v. Weaver, 135.  
Holmes v. Wilson, 125.  
Holsted v. Postal Tel. Cable Co., 388.  
Holt v. Sargent, 131.  
Holt v. Van Eps, 321.  
Holyoke v. Grand Trunk Ry., 107, 132, 138, 150.  
Home Ins. Co. v. Baltimore Warehouse Co., 191.  
Homes Ins. Co. v. Pennsylvania R. Co., 251, 256.  
Honsae v. Hammond, 35.  
Hood v. Palm, 333.  
Hooker v. Newton, 349.  
Hooker v. Phillippe, 524.  
Hooks Smelting Co. v. Planters' Compress Co., 78, 85.  
Hoon v. Beaver Valley Traction Co., 487.  
Hoon v. Boise City Canal Co., 139.  
Hooper v. Bacon, 95.  
Hopkins v. Atlanta & St. L. R. R., 314.  
Hopkins v. Butte & M. Commercial Co., 502.  
Hopkins v. Crittenden, 260.  
Hopkins v. Grazebrook, 510.  
Hopkins v. Lee, 509, 510.  
Hopkins v. Orr, 348.  
Hopkins v. Sanford, 71, 74.  
Hopkins v. Shepard, 231.  
Hopkins v. Western Pac. R. Co., 505.  
Hoppe v. Chicago, M. & St. P. R. Co., 101, 459.  
Hopper v. Haines, 282.  
Hopple v. Higbee, 189.  
Horne v. Midland R. Co., 71, 82, 84, 361, 375, 376, 377.  
Horner v. Wood, 45.  
Horsford v. Wright, 518.  
Horton v. Cooley, 269.  
Horton v. Taunton, 60.  
Hoseth v. Preston Mill Co., 61.  
Hosking v. Phillips, 508.  
Hoskins v. Scott, 104.  
Hosmer v. Wilson, 353.  
Hosty v. Moulton Water Co., 150.  
Hotchkiss v. Jones, 321.  
Hotchkiss v. Oliphant, 179.  
Houghkirk v. President, etc., of Delaware & H. Canal Co., 101, 455.  
Houghton v. Furbush, 351.  
Houghton v. Page, 225.  
House v. Tennessee Female College, 266.  
Houseman v. Merchants' Dispatch Transp. Co., 375.  
Houser v. Pearce, 47.  
Houston v. Jamison's Adm'r, 267.  
Houston City St. R. Co. v. Jageman, 157.  
Houston & T. C. R. Co. v. Boehm, 102.

[The figures refer to pages]

- Houston & T. C. R. Co. v. Bradley, 435.  
 Houston & T. C. R. Co. v. Burke, 279.  
 Houston & T. C. R. Co. v. Crone, 383.  
 Houston & T. C. R. Co. v. Hill, 111.  
 Houston & T. C. R. Co. v. Jackson, 375.  
 Houston & T. C. R. Co. v. Moore, 435.  
 Houston & T. C. R. Co. v. Muldrow, 256.  
 Houston & T. C. R. Co. v. Nixon, 460.  
 Houston & T. R. Co. v. Baker, 435.  
 Hovey v. Edmison, 264.  
 Hovey v. Grant, 274.  
 Hovey v. Page, 3.  
 Howard v. Barnard, 345, 346.  
 Howard v. Daly, 93, 94, 118.  
 Howard v. Delaware & H. Co., 473.  
 Howard v. Farley, 267.  
 Howard v. Grover, 347.  
 Howard v. Henderson Traction Co., 138.  
 Howard v. Hopkyns, 221.  
 Howard v. Manderfield, 188.  
 Howard County Board of Com'rs v. Legg, 448.  
 Howard Oil Co. v. Davis, 102.  
 Howcott v. Collins, 230.  
 Howe v. Peekham, 115.  
 Howe v. Ray, 188.  
 Howell v. Goodrich, 113, 114.  
 Howell v. Moores, 518.  
 Howell v. Scoggins, 134.  
 Howland v. Vincent, 13.  
 Hoy v. Gronoble, 318.  
 Hoyt v. Thompson, 3.  
 Hoyt v. Wildfire, 93.  
 Huber v. Teuber, 322.  
 Huckestein v. Allegheny City, 133.  
 Huckle v. Money, 302, 314, 319.  
 Hudson v. Houser, 442, 443.  
 Hudspeth v. Allen, 38.  
 Huerzeler v. Central C. T. R. Co., 456.  
 Huey v. Macon County, 265.  
 Huford v. Grand Rapids & I. R. Co., 382.  
 Huftalin v. Misner, 315.  
 Huggins v. Southeastern Lime & Cement Co., 361.  
 Hughes v. Graeme, 135.  
 Hughes v. McDonough, 64.  
 Hughes v. Western Union Tel. Co., 394.  
 Hulbert v. Topeka, 424.  
 Hummel v. Brown, 224.  
 Humphrey v. Brown, 522.  
 Humphreys v. Morton, 265.  
 Humphreysville Copper Co. v. Vermont Cooper Min. Co., 357.  
 Humphries v. Johnson, 323.  
 Hunn v. Michigan Cent. R. Co., 475, 477.  
 Hunt v. Conner, 425, 426, 423, 429, 430, 431, 441, 443.  
 Hunt v. Hoboken Land Imp. Co., 107.  
 Hunt v. Jucks, 230.  
 Hunt v. Missouri, K. & T. R. Co., 62.  
 Hunt v. O'Neill, 497.  
 Hunt v. Raplee, 516.  
 Hunt v. Tibbetts, 117.  
 Hunt Bros. Co. v. San Lorenzo Water Co., 74, 77.  
 Hunter v. Hatfield, 528.  
 Hunter v. Stewart, 336.  
 Huntington v. Ogdenburg & L. C. R. Co., 94.  
 Huntington & B. T. M. R. & Coal Co. v. Decker, 446.  
 Huntington & B. T. M. R. & Coal Co. v. English, 292.  
 Huntley v. Bacon, 309.  
 Huntress v. Burbank, 258.  
 Hurd v. Hall, 518.  
 Hurd v. Hubbell, 282.  
 Hurlehy v. Martine, 178.  
 Hurley v. Buchi, 111.  
 Hurley v. Jones, 500.  
 Hurst v. Detroit City R. Co., 451, 460, 488, 489, 490.  
 Huse & Loomis Ice & Transp. Co. v. Heinze, 276.  
 Huson v. Dale, 179.  
 Hussey v. President, etc., of Mfgs' & Mechanics' Bank, 294.  
 Huston v. Freemansburg Borough, 143, 147.  
 Huston v. Twin & City Creek Turnpike Road Co., 331.  
 Hutchins v. Roundtree, 516.  
 Hutchins v. St. Paul, M. & M. R. Co., 348, 429, 466, 486.  
 Hutchinson v. Stern, 12, 143, 147.  
 Hutchinson v. Williams, 135.  
 Hutchinson Mfg. Co. v. Pinch, 110.  
 Hutchison v. Southern R. Co., 318.  
 Hutchison v. Summerville, 39.  
 Hutton v. Windsor, 446.  
 Huxley v. Berg, 57, 68.  
 Hyatt v. Adams, 322, 422, 423.  
 Hyatt v. Hood, 38.  
 Hyatt v. Rondout, 60.  
 Hyde v. Stone, 229, 253, 254.  
 Hyde v. Union Pac. R. Co., 430.  
 Hydraulic Co. v. Chatfield, 280.

[The figures refer to pages]

Hydraulic Engineering Co. v. McHaffie, 83, 361.  
Hynes v. Patterson, 136.

I

Ide v. Boston & M. R. R., 252.  
Ihl v. Forty-Second St. & G. St. Ferry R. Co., 32, 453, 454, 455, 489.  
Ikard v. Telegraph Co., 162.  
Iler v. Baker, 278.  
Illinois Cent. R. Co. v. Baches, 474, 475.  
Illinois Cent. R. Co. v. Barron, 429, 436, 472, 482.  
Illinois Cent. R. Co. v. Bents, 430.  
Illinois Cent. R. Co. v. Cobb, 81, 82, 92, 98, 375.  
Illinois Cent. R. Co. v. Crudup, 433, 476, 478.  
Illinois Cent. R. Co. v. Grabill, 505.  
Illinois Cent. R. Co. v. Hammer, 326.  
Illinois Cent. R. Co. v. Johnson & Fleming, 77, 84, 85.  
Illinois Cent. R. Co. v. Owens, 375.  
Illinois Cent. R. Co. v. Porter, 187.  
Illinois Cent. R. Co. v. Prickett, 480.  
Illinois Cent. R. Co. v. Siddons, 141, 145.  
Illinois Cent. R. Co. v. Slater, 451, 474, 476.  
Illinois Cent. R. Co. v. Southern Seating & Cabinet Co., 377.  
Illinois Cent. R. Co. v. Sutton, 157.  
Illinois Cent. R. Co. v. Weldon, 441, 445, 448.  
Illinois & St. L. R. & Coal Co. v. Cobb, 189.  
Illinois & St. L. R. & Coal Co. v. Ogle, 501.  
Imboden v. Etowah & B. B., Hydraulic Hose Min. Co., 188.  
Independent Ins. Co. v. Thomas, 298.  
Independent Order of Mut. Aid v. Stahl, 347.  
Indiana, B. & W. R. Co. v. Adamson, 47.  
Indiana, B. & W. R. Co. v. Allen, 282.  
Indiana, B. & W. R. Co. v. Eberle, 122.  
Indiana Canning Co. v. Priest, 352.  
Indiana R. Co. v. Orr, 157.  
Indianapolis, B. & W. R. Co. v. Birney, 60, 88, 382.

Indianapolis, P. & C. R. Co. v. Pitzer, 46.  
Indianapolis St. R. Co. v. Ray, 170.  
Indianapolis & St. L. R. Co. v. Stables, 149, 170.  
Ingalls v. Bills, 90.  
Ingledew v. Cripps, 221.  
Ingledew v. Northern R., 375.  
Ingram v. Rankin, 282, 287, 295.  
Inhabitants of Alma v. Plummer, 512.  
Inhabitants of Canton v. Smith, 246.  
Inhabitants of Hyde Park v. Gay, 18.  
Inhabitants of Lowell v. Boston & L. R. Co., 136.  
Inhabitants of Westfield v. Mayo, 135, 136.  
Inman v. St. Louis S. W. R. Co., 370.  
Innes v. Milwaukee, 487.  
Insurance Co. v. Brame, 422.  
International Ocean Tel. Co. v. Saunders, 166.  
International & G. N. R. Co. v. Boykin, 438, 492.  
International & G. N. R. Co. v. Carr, 273.  
International & G. N. R. Co. v. Davis, 500.  
International & G. N. R. Co. v. Kindred, 466, 476.  
International & G. N. R. Co. v. McNeel, 486.  
International & G. N. R. Co. v. Miller, 328.  
International & G. N. R. Co. v. Nicholson, 277.  
International & G. N. R. Co. v. Ormond, 442.  
International & G. N. R. Co. v. Smith, 156, 334.  
International & G. N. R. Co. v. Wilkes, 156.  
Iowa-Minnesota Land Co. v. Conner, 100.  
Irby v. Wilde, 49.  
Irlbocker v. Roth, 236.  
Iron City Toolworks v. Wellisch, 104.  
Iron Mountain R. Co. v. Bingham, 16.  
Irvin v. Hazleton, 239.  
Irving v. Greenwood, 529.  
Irwin v. Askew, 509.  
Irwin v. Dearman, 322.  
Isaac Newton, The, 248.  
Isenhardt v. Brown, 267.  
Isom v. Book, 508.

[The figures refer to pages]

Ives v. Humphreys, 41, 140.  
Iveson v. Moore, 23.

## J

Jacks v. Turner, 237.  
Jackson v. Bellevieu, 60.  
Jackson v. Cleveland, 209.  
Jackson v. Consolidated Traction Co., 486.  
Jackson v. Covert's Adm'r, 330.  
Jackson v. Evans, 295.  
Jackson v. Hall, 57, 68.  
Jackson v. Independent School Dist. of Steamboat Rock, 94.  
Jackson v. Julia Smith, The, 371.  
Jackson v. Nashville, C. & St. L. R. Co., 64.  
Jackson v. Noble, 154.  
Jackson v. Pittsburgh, C., C. & St. L. R. Co., 422, 439.  
Jackson v. St. Louis, I. M. & S. R. Co., 46, 425.  
Jackson v. Schmidt, 313.  
Jackson v. Wood, 495, 497.  
Jackson Architectural Iron Works v. Hurlbut, 131.  
Jackson Electric Ry. Light & Power Co. v. Lowry, 318.  
Jackson's Ex'rs v. Lloyd, 258.  
Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co., 255, 274.  
Jacksonville, T. & K. W. R. Co. v. Roberts, 339.  
Jacob v. Western Union Tel. Co., 387.  
Jacobs v. Glucose Sugar Refining Co., 436.  
Jacobs v. Hoover, 176.  
Jacobs v. Louisville & N. R. Co., 326.  
Jacobs v. Postal Tel. Cable Co., 416.  
Jacobs v. Sire, 317, 530.  
Jacobs' Adm'r v. Louisville & N. R. Co., 315.  
Jacobson v. Poindexter, 134.  
Jacobus v. Monongahela Nat. Bank, 135.  
Jacoby v. Stark, 318, 522, 530.  
Jacot v. Emmett, 231.  
Jacques v. Bridgeport Horse R. Co., 102.  
James v. Christy, 422.  
James v. Richmond & D. R. Co., 488.  
Janson v. Stuart, 21.  
Jaqua v. Headington, 214.  
Jaquith v. Hudson, 198, 199, 210.  
Jasper v. Funnell, 315.

Jay v. Almy, 18, 152.  
J. E. Dunn & Co. v. Smith, 163.  
Jefferson v. Adams, 323.  
Jefferson County v. Lewis, 259.  
Jeffersonville, M. & I. R. Co. v. Esterle, 123.  
Jeffersonville, M. & I. R. Co. v. Rikey, 43.  
Jeffersonville R. Co. v. Rogers, 321.  
Jeffersonville R. Co. v. Swayne's Adm'r, 431.  
Jeffrey v. Bigelow, 56.  
Jellett v. St. Paul, M. & M. R. Co., 282, 372.  
Jemison v. Gray, 200.  
Jenkins v. Hankins, 489.  
Jenkins v. Jones, 518.  
Jenkins v. McConico, 262, 293.  
Jenkins v. Steanka, 331.  
Jennette v. Sullivan, 524.  
Jennings v. Johnson, 191.  
Jennings v. Maddox, 313.  
Jennings v. Oregon Land Co., 510.  
Jennings v. Railroad Co., 480.  
Jennings v. Willer, 212.  
Jennison v. Hapgood, 266.  
Jerome v. Smith, 317.  
Jersey City v. O'Callaghan, 231.  
Jeter v. Glenn, 136, 514.  
Jewell v. Grand Trunk Ry., 46.  
Jewett v. Whitney, 14, 33.  
J. I. Case Plow Works v. Niles & Scott Co., 240, 244, 246, 306.  
Joch v. Dankwardt, 141, 150.  
Jockers v. Borgman, 313.  
Johannesson v. Borschenius, 186.  
Johansen v. Modahl, 523.  
Johnson v. Allen, 273, 315, 322, 358.  
Johnson v. Atlantic & St. L. R. Co., 239.  
Johnson v. Bennett, 3.  
Johnson v. Brown, 330.  
Johnson v. Camp, 315.  
Johnson v. Caulkins, 523, 527.  
Johnson v. Chicago, R. I. & P. R. Co., 334.  
Johnson v. Chicago & N. W. R. Co., 101, 254, 459, 460, 462, 475.  
Johnson v. Collins, 519.  
Johnson v. Disbrow, 322.  
Johnson v. Drummond, 68.  
Johnson v. Gwinn, 211.  
Johnson v. Holyoke, 112.  
Johnson v. Jenkins, 162, 318, 528, 530.  
Johnson v. Long Island R. Co., 486.  
Johnson v. Marshall, 285, 293.  
Johnson v. Missouri Pac. R. Co., 464.

[The figures refer to pages]

Johnson v. Robertson, 153.  
 Johnson v. Schultz, 155.  
 Johnson v. Smith, 316, 317, 348.  
 Johnson v. Stallcup, 298.  
 Johnson v. State, 18.  
 Johnson v. Stear, 191.  
 Johnson v. Sumner, 254.  
 Johnson v. Travis, 523, 528, 531.  
 Johnson v. Von Kettler, 315, 336, 348.  
 Johnson v. Weedman, 303.  
 Johnson v. Wells Fargo & Co., 141, 150.  
 Johnson v. Western Union Tel. Co., 168, 170, 401.  
 Johnston v. Cleveland & T. R. Co., 489.  
 Johnston v. Cowan, 214.  
 Johnston v. Crawford, 324.  
 Johnston v. Morrow, 348.  
 Johnston v. Railroad Co., 452.  
 Johnston v. Whittemore, 216.  
 Joice v. Branson, 313.  
 Jolly v. Single, 56.  
 Jonas v. Hirshburg, 329.  
 Jones v. Boyce, 90.  
 Jones v. Call, 107.  
 Jones v. Chamberlin, 299.  
 Jones v. George, 110, 366.  
 Jones v. Gilmore, 65.  
 Jones v. Hannover, 14, 32, 33, 502.  
 Jones v. Horn, 282.  
 Jones v. Just, 365.  
 Jones v. King, 36.  
 Jones v. Manufacturers' Nat. Bank, 258.  
 Jones v. Marshall, 334.  
 Jones v. Matthews, 311.  
 Jones v. National Printing Co., 362.  
 Jones v. New York Cent. & H. R. Co., 344.  
 Jones v. Railroad Co., 16.  
 Jones v. Reg., 212.  
 Jones v. St. Louis R. Co., 16.  
 Jordan v. Gillen, 3.  
 Jordan v. Lewis, 205.  
 Jordan v. Middlesex R. Co., 101.  
 Jordan v. Patterson, 361.  
 Jordan v. Seattle, 139.  
 Joseph Schlitz Brewing Co. v. Compton, 122, 123.  
 Joshua Barker, The, 371.  
 Joslin v. Grand Rapids Ice & Coal Co., 130.  
 Josling v. Irvine, 357.  
 Jourolman v. Ewing, 230, 249.  
 Joy v. Bitzer, 55.  
 J. S. Keator Lumber Co. v. St. Croix Boom Corp., 16.  
 Judd v. Dike, 235.  
 Julia Smith, The, 371.

Juilliard v. Greenman, 296.  
 Justrobo v. Price, 300.  
 Jutte v. Hughes, 505, 506.  
 J. Wragg & Sons Co. v. Mead, 47, 75.

K

Kadish v. Young, 98, 352.  
 Kalckhoff v. Zoehrlaut, 276.  
 Kalen v. Terre Haute & I. R. Co., 140.  
 Kaley v. Shed, 188.  
 Kane v. New York, N. H. & H. R. Co., 138.  
 Kankakee & S. R. Co. v. Horan, 98.  
 Kansas City v. Manning, 343.  
 Kansas City, Ft. S. & M. R. Co. v. Dalton, 163, 380.  
 Kansas City, Ft. S. & M. R. Co. v. Daughtry, 434.  
 Kansas City, Ft. S. & M. R. Co. v. Little, 382.  
 Kansas City Hotel Co. v. Sauer, 136.  
 Kansas City, M. & B. R. Co. v. Riley, 382.  
 Kansas Pac. R. Co. v. Cutter, 426, 429, 436, 482.  
 Kansas Pac. R. Co. v. Muhlman, 116, 121, 124, 125.  
 Kantzler v. Grant, 529.  
 Karczewski v. Wilmington City R. Co., 130.  
 Katen v. Terre Haute & I. R. Co., 142.  
 Kauffman v. Babcock, 102.  
 Kaufman v. Fye, 525, 526.  
 Kaufman v. Treadway, 236.  
 Kavannaugh v. Janesville, 347.  
 Kear v. Garrison, 155.  
 Kearney v. Fitzgerald, 154.  
 Keck v. Bieber, 117, 216, 218.  
 Keeble v. Keeble, 209, 213, 214, 219.  
 Keefe v. Fairfield, 216.  
 Keeler v. Wood, 136, 516.  
 Keenan v. Cavanaugh, 45.  
 Keene v. Keene, 227, 259.  
 Keene v. Lizardi, 324.  
 Keenholts v. Becker, 116.  
 Kehrig v. Peters, 325.  
 Keil v. Chartiers Val. Gas Co., 328.  
 Keirnan v. Heaton, 321.  
 Keith's Ex'r v. Hinkston, 80.  
 Keller v. New York Cent. R. Co., 483.  
 Keller v. Strasburger, 354.  
 Kellett v. Robie, 524.  
 Kelley v. Central R. R. of Iowa, 433, 436.

[The figures refer to pages]

- Kelley v. Chicago, M. & St. P. R. Co., 445, 490.  
 Kelley v. Fond du Lac, 60.  
 Kelley v. Highfield, 528, 531.  
 Kelley v. Ohio River R. Co., 432.  
 Kelley v. Riley, 524.  
 Kelley v. Third Nat. Bank of Chicago, 330.  
 Kelley, Maus & Co. v. La Crosse Carriage Co., 359.  
 Kellogg v. Chicago & N. W. R. Co., 54.  
 Kellogg v. Frohlich, 351.  
 Kellogg v. Hickok, 258.  
 Kellogg v. Lavender, 260.  
 Kellogg v. Malin, 517.  
 Kellogg v. New York Cent. & H. R. R. Co., 480.  
 Kellogg v. Sweeney, 298.  
 Kelly v. Fahrney, 77.  
 Kelly v. Pittsburg, C., C. & St. L. R. Co., 123, 127.  
 Kelly v. Renfro, 528.  
 Kelly v. Rogers, 132, 134.  
 Kelly v. Twenty-Third St. R. Co., 484.  
 Kelsey v. Murphy, 239.  
 Kemble v. Farren, 198, 218.  
 Kemp v. Knickerbocker, 197.  
 Kempner v. Cohn, 509.  
 Kendall v. Albia, 150, 151, 170, 171.  
 Kendall v. Stone, 303.  
 Kendrick v. McCrary, 153, 322.  
 Kennedy v. Busse, 95.  
 Kennedy v. North Missouri R. Co., 316.  
 Kennedy v. St. Louis Transit Co., 335.  
 Kennedy v. St. Paul City R. Co., 344.  
 Kennedy v. Strong, 229, 282.  
 Kennedy v. Whitwell, 253, 282, 294, 363.  
 Kennedy v. Woods, 331.  
 Kenney v. Hannibal & St. J. R. Co., 228.  
 Kenney v. New York Cent. & H. R. R. Co., 489, 491.  
 Kennison v. Taylor, 136.  
 Kennon v. Gilmer, 150, 347.  
 Kennon v. Western Union Tel. Co., 388.  
 Kenny v. Collier, 32, 108.  
 Kenrig v. Eggleston, 48.  
 Kent v. Bown, 262.  
 Kent v. Ginter, 285.  
 Kent v. Railroad Co., 372.  
 Kentucky Cent. R. Co. v. Gastineau's Adm'r, 434.  
 Kentucky Heating Co. v. Hood, 66.  
 Kenyon v. Western Union Tel. Co., 397.  
 Kerr v. Haverstick, 260.  
 Kerslake v. McInnis, 209.  
 Kester v. Miller, 365.  
 Kester v. Western Union Tel. Co., 166.  
 Keyes v. Minneapolis & St. L. R. Co., 151.  
 Kid v. Mitchell, 294.  
 Kidder v. Barker, 38.  
 Kidder v. Inhabitants of Oxford, 256.  
 Klene v. Ruff, 22.  
 Kiff v. Youmans, 176, 315.  
 Kilbourn v. Thompson, 313, 314, 343.  
 Kiley v. Western Union Tel. Co., 387, 400.  
 Kille v. Ege, 495.  
 Kilpatrick v. Haley, 324.  
 Kimball v. Bryant, 513.  
 Kimball v. Holmes, 144, 160.  
 Kimball Bros. Co. v. Citizens' Gas & Electric Co., 90.  
 Kimberly v. Howland, 12, 147.  
 Kimel v. Kimel, 507.  
 Kimes v. St. Louis, I. M. & S. R. Co., 228.  
 Kimmel v. Burns, 260.  
 King v. Ann Arbor R. Co., 487.  
 King v. Chicago, M. & St. P. R. Co., 113, 114.  
 King v. Fowler, 502.  
 King v. Ham, 282.  
 King v. Howard, 347.  
 King v. Little, 496.  
 King v. Phillips, 231.  
 King v. Richards, 23.  
 King v. Root, 303, 320.  
 King v. Shepherd, 372.  
 King v. Sherwood, 373.  
 King v. Steiren, 93.  
 Kingsbury v. Westfall, 187.  
 Kinney v. Folkerts, 138, 150.  
 Kirkman v. Vanlier, 258.  
 Kitchen v. Branch Bank at Mobile, 236.  
 Klanowski v. Grand Trunk R. Co., 456.  
 Klein v. Jewett, 138.  
 Klein v. St. Louis Transit Co., 279.  
 Klepsch v. Donald, 433, 434.  
 Klewin v. Bauman, 320.  
 Kline v. Kline, 145, 155.  
 Klingman v. Holmes, 322.  
 Klock v. Robinson, 238.  
 Klopfer v. Bromme, 323.  
 Klumph v. Dunn, 182.  
 Knapp v. Maltby, 210, 213, 214.  
 Knapp v. Roche, 186.  
 Knettle v. Crouse, 267.

[The figures refer to pages]

- Knickerbocker Ins. Co. v. Gould, 235.  
 Kniffen v. McConnell, 522, 523, 524, 526.  
 Knight v. Davis Carriage Co., 190.  
 Knott v. Peterson, 476.  
 Knowles v. Norfolk S. R. Co., 314, 321.  
 Knowles v. Steele, 37, 510, 520.  
 Knowlton v. Mackay, 213.  
 Knox v. Jones, 229.  
 Knox v. Lee, 296.  
 Koch v. Sackman-Phillips Inv. Co., 503.  
 Koeltz v. Bleckman, 347.  
 Koenigs v. Jung, 321, 504.  
 Koerber v. Patek, 158.  
 Koerner v. Oberly, 154.  
 Koestenbader v. Peirce, 517.  
 Kohler v. Smith, 259.  
 Kolb v. Bankhead, 314, 501.  
 Kolb v. O'Brien, 341.  
 Koons v. Miller, 229.  
 Kosorowaka v. Gasser, 479.  
 Kopp v. Northern Pac. R. Co., 502.  
 Korrady v. Lake Shore & M. S. R. Co., 489, 491.  
 Koshkonong v. Burton, 265.  
 Kountz v. Brown, 314.  
 Kountz v. Kirkpatrick, 275, 357.  
 Kral v. Burlington, C. R. & N. R. Co., 47.  
 Kribs v. Jones, 356.  
 Kroener v. Chicago, M. & St. P. R. Co., 343.  
 Krohn v. Oechs, 372.  
 Krom v. Levy, 110.  
 Krug v. Pitass, 311.  
 Krug v. Ward, 136.  
 Krumm v. Beach, 511.  
 Kurts v. Frank, 163, 523.  
 Kurts v. Sponable, 220.
- L**
- La Amistad de Rues, 103.  
 Lacas v. Detroit City R. Co., 132.  
 Ladd v. Arkell, 299.  
 Ladd v. Foster, 433.  
 Laffin v. Willard, 30, 33.  
 Laird v. Chicago & A. R. Co., 312.  
 Laird v. Pirn, 512.  
 Lake v. Merrill, 329.  
 Lake Erie & W. R. Co. v. Christison, 156.  
 Lake Erie & W. R. Co. v. Fix, 156, 171, 382, 385.  
 Lake Erie & W. R. Co. v. Griffin, 187, 269.  
 Lake Erie & W. R. Co. v. Mugg, 444, 472.  
 Lakeman v. Grinnell, 372.  
 Lake Shore & M. S. R. Co. v. Frantz, 102.  
 Lake Shore & M. S. R. Co. v. Hutchins, 282.  
 Lake Shore & M. S. R. Co. v. Parker, 482.  
 Lake Shore & M. S. R. Co. v. Prentice, 327, 328.  
 Lake Shore & M. S. R. Co. v. Rosenzweig, 326, 328.  
 Lake Shore & M. S. R. Co. v. Sunderland, 458.  
 Lakeside Paper Co. v. State, 237.  
 Lambert v. Craig, 347.  
 Lambert v. Estes, 515.  
 Lambert v. Norfolk, 159.  
 Lamming v. Galusha, 27.  
 Lamphear v. Buckingham, 437.  
 Lampman v. Cochran, 198, 213, 217, 219, 221.  
 Lamson v. Marshall, 212.  
 Lanahan v. Heaver, 196.  
 Lanahan v. Ward, 261, 266.  
 Landa v. Obert, 134.  
 Landsberger v. Magnetic Tel. Co., 413.  
 Lane v. Atlantic Works, 45.  
 Lane v. Richardson, 519.  
 Langdon v. Castleton, 265.  
 Lange v. Schoettler, 433.  
 Lange v. Wagner, 56.  
 Langford v. Owsley, 119, 120.  
 Langston v. South Carolina R. Co., 260, 265.  
 Lankin v. Terwilliger, 19.  
 Lannen v. Albany Gaslight Co., 58.  
 Lansing v. Dodd, 218.  
 Lansing v. Stone, 27.  
 Lantz v. Frey, 330.  
 Lanusse v. Barker, 299.  
 Lapleigne v. Morgan's L. & T. R. & S. S. Co., 46.  
 Laraway v. Perkins, 337.  
 Larios v. Gurety, 55, 61.  
 Larned v. Buffinton, 182.  
 Larrabee v. Minnesota Tribune Co., 180.  
 Larson v. Chase, 145, 158.  
 Larwell v. Stevens, 494.  
 Lash v. Lambert, 259.  
 Latham v. Brown, 276.  
 Latham v. Darling, 261.  
 Lathers v. Wyman, 45.  
 Latimer v. Motter, 191.  
 Laura Jane v. Hagen, 259.  
 Laurens v. Bernauer, 210.  
 Lavender v. Hudgens, 153.  
 Lavery v. Crooke, 316, 322.  
 Lawis v. Railroad Co., 296.  
 Lawless v. Collier's Ex'rs, 514.  
 Lawrence v. Birney, 462.  
 Lawrence v. Cooke, 523.



[The figures refer to pages]

- Lawrence v. Cowles, 220, 262.  
 Lawrence v. Hagerman, 67, 136, 319.  
 Lawrence v. Jenkins, 55.  
 Lawrence v. Maxwell, 290.  
 Lawrence v. Porter, 88, 91, 92.  
 Lawrence v. Rice, 30, 33.  
 Lawrence R. Co. v. Cobb, 251.  
 Lawson v. Chicago, St. P., M. & O. R. Co., 101, 472.  
 Laycock v. Parker, 244, 248.  
 Layton v. Butler, 498.  
 Lazarus v. Ely, 188.  
 Lazelle v. Newfane, 429, 488.  
 Lea v. Whitaker, 215.  
 Leach v. Leach, 152, 155.  
 Leahy v. Davis, 430.  
 Learned v. Castle, 507.  
 Leary v. Ladin, 211.  
 Leatherberry v. Odell, 94.  
 Leavitt v. Cutler, 524, 526, 531.  
 Leaxock v. Foxson, 292.  
 Le Blanche v. Railroad Co., 91, 381.  
 Le Branthwait v. Halsey, 258.  
 Lee v. Carroll Normal School Co., 208.  
 Lee v. Crump, 320.  
 Lee v. Mathews, 281.  
 Lee v. Overstreet's Adm'r, 214.  
 Lee v. Publishers: George Knapp & Co., 467.  
 Lee v. Riley, 55.  
 Lee v. Wilcocks, 299.  
 Lee v. Woolsey, 176.  
 Leeds v. Cook, 529.  
 Leeds v. Metropolitan Gaslight Co., 100.  
 Leet v. Gratz, 515.  
 Leffingwell v. Elliott, 136, 137, 516.  
 Legge v. Harlock, 212.  
 Leggett v. Mutual Life Ins. Co. of New York, 213.  
 Le Grange v. Hamilton, 257.  
 Lehigh Iron Co. v. Rupp, 438, 460, 465.  
 Lehman v. Brooklyn, 453, 489.  
 Leland v. Tousey, 330.  
 Lentz v. Choteau, 111.  
 Leonard v. New York, A. & B. Electric Magnetic Tel. Co., 71, 81, 96, 98, 417.  
 Leonard v. Villars, 267.  
 Le Peintur v. Southeastern R. Co., 6.  
 Lesson v. Smith, 347.  
 Letcher v. Woodson, 229.  
 Lett v. Railway Co., 427, 449.  
 Levitzky v. Canning, 136.  
 Lewark v. Parkinson, 131.  
 Lewis v. Flint & P. M. R. Co., 57.  
 Lewis v. Holmes, 160.  
 Lewis v. Paschal's Adm'r, 266.  
 Lewis v. Peake, 367.  
 Lewis v. Rountree, 82, 230.  
 Lewis v. Small, 266.  
 Lewis v. Walter, 181.  
 Lexington & E. R. Co. v. Lyons, 385.  
 Lick v. Faulkner, 296.  
 Lienkauf v. Morris, 314, 324.  
 Liermann v. Chicago, M. & St. P. R. Co., 447.  
 Liese v. Meyer, 523, 524.  
 Lichtner v. Menzel, 211.  
 Lillard v. Whitaker, 282.  
 Lillie v. Lillie, 135.  
 Lilly v. Lilly, Bogardus & Co., 361.  
 Liman v. Pennsylvania R. Co., 81.  
 Liming v. Illinois Cent. R. Co., 67.  
 Linam v. Reeves, 282.  
 Lincoln v. Claffin, 252.  
 Lincoln v. Saratoga & S. R. Co., 103.  
 Lindsay v. Anesley, 215.  
 Lindt v. Great Northern R. Co., 158.  
 Linlon Coal & Mining Co. v. Persons, 131.  
 Linsley v. Bushnell, 134, 314.  
 Linton v. Hurley, 3.  
 Linville v. Black, 282.  
 Liotard v. Graves, 228.  
 Little v. Banks, 211, 236.  
 Little v. Boston & M. R. R., 45, 48.  
 Little v. Stanback, 21.  
 Littlejohn v. Wilcox, 135.  
 Little Rock, M. R. & T. R. Co. v. Leverett, 476.  
 Little Rock Ry. & Electric Co. v. Dobbins, 326, 382.  
 Little Rock Traction & Electric Co. v. Winn, 326.  
 Little Rock & Ft. S. R. Co. v. Barker, 429, 438, 451, 456, 457, 459, 486, 487.  
 Little Rock & Ft. S. R. Co. v. Dean, 156.  
 Little Rock & Ft. S. R. Co. v. Voss, 467.  
 Littlewood v. New York, 424.  
 Lively, The, 103.  
 Livermore v. Northrup, 184.  
 Livingston v. Burroughs, 177, 315.  
 Livingston v. Miller, 246.  
 Llewellyn v. Rutherford, 109, 276.  
 Lobdell v. Stowell, 290.  
 Lockett v. Ft. Worth & R. G. R. Co., 506.  
 Lockwood v. New York, L. E. & W. R. Co., 476, 484.  
 Lockwood v. Onion, 340.

[The figures refer to pages]

- Loder v. Kekule, 366.  
 Loeb v. Flash, 292.  
 Loesser v. Humphrey, 95.  
 Logan v. Hannibal & St. J. R. Co., 314, 384.  
 Loiseau v. Threlstad, 518.  
 Loker v. Damon, 88, 93, 97.  
 Lombard v. Batchelder, 312.  
 Lombard v. Chicago, R. I. & P. R. Co., 348.  
 Lombard v. Lennox, 153.  
 Long v. Booe, 322.  
 Long v. Bowring, 221.  
 Long v. Clapp, 56.  
 Long v. Lamkin, 185.  
 Long v. Morrison, 430.  
 Longobardi v. Yuliano, 215.  
 Longworth v. Askren, 205.  
 Longworth v. Mitchell, 297.  
 Loomis v. Wadhams, 509.  
 Loper v. Telegraph Co., 164.  
 Lord v. Carbon Iron Mfg. Co., 121.  
 Lord v. Gaddis, 218.  
 Lord v. New York, 239.  
 Lord Townsend v. Hughes, 345.  
 Losee v. Buchanan, 27.  
 Lothrop v. Adams, 180.  
 Louder v. Hinson, 314, 320.  
 Loudon v. Taxing Dist. of Shelby County, 223.  
 Lough v. Minneapolis & St. L. R. Co., 256.  
 Loughran v. Des Moines, 505, 506.  
 Louis v. Buckeye, 372.  
 Louisville Bridge Co. v. Louisville & N. R. Co., 100.  
 Louisville, C. & L. R. Co. v. Mahony's Adm'r, 434, 477.  
 Louisville Gas Co. v. Gutenkuntz, 58.  
 Louisville, N. A. & C. R. Co. v. Buck, 491.  
 Louisville, N. A. & C. R. Co. v. Falvey, 47, 96, 131.  
 Louisville, N. A. & C. R. Co. v. Jones, 46.  
 Louisville, N. A. & C. R. Co. v. Lucas, 68.  
 Louisville, N. A. & C. R. Co. v. Power, 47.  
 Louisville, N. A. & C. R. Co. v. Rush, 431, 457.  
 Louisville, N. A. & C. R. Co. v. Snyder, 47.  
 Louisville, N. A. & C. R. Co. v. Sparks, 500.  
 Louisville, N. A. & C. R. Co. v. Sumner, 47, 97.  
 Louisville, N. A. & C. R. Co. v. Wolfe, 327.  
 Louisville, N. A. & C. R. Co. v. Wood, 44, 46.  
 Louisville & N. R. Co. v. Ballard, 313, 314, 326.  
 Louisville & N. R. Co. v. Binion, 138.  
 Louisville & N. R. Co. v. Brooks' Adm'r, 317, 349, 434.  
 Louisville & N. R. Co. v. Brown, 442.  
 Louisville & N. R. Co. v. Burke, 437.  
 Louisville & N. R. Co. v. Conley, 437.  
 Louisville & N. R. Co. v. Creighton, 429.  
 Louisville & N. R. Co. v. Earl's Adm'r, 314.  
 Louisville & N. R. Co. v. Foley, 344.  
 Louisville & N. R. Co. v. Garrett, 326.  
 Louisville & N. R. Co. v. Greer, 321.  
 Louisville & N. R. Co. v. Howard, 437.  
 Louisville & N. R. Co. v. Jones, 465.  
 Louisville & N. R. Co. v. Keller, 318.  
 Louisville & N. R. Co. v. Lansford, 434.  
 Louisville & N. R. Co. v. Law, 344.  
 Louisville & N. R. Co. v. Mason, 373.  
 Louisville & N. R. Co. v. Northington, 46.  
 Louisville & N. R. Co. v. Ray, 334.  
 Louisville & N. R. Co. v. Satterwhite, 486.  
 Louisville & N. R. Co. v. Scott's Adm'r, 486.  
 Louisville & N. R. Co. v. Shivel's Adm'r, 434.  
 Louisville & N. R. Co. v. Stacker, 438.  
 Louisville & N. R. Co. v. Stewart, 278, 279.  
 Louisville & N. R. Co. v. Sullivan Timber Co., 88, 98.  
 Louisville & N. R. Co. v. Survant, 344.  
 Louisville & N. R. Co. v. Trammell, 445.  
 Louisville & N. R. Co. v. Wallace, 234, 250.  
 Louisville & N. R. Co. v. Whitley County Court, 344.  
 Louisville & N. R. Co. v. Whittman, 157, 171, 329.  
 Louisville & N. Terminal Co. v. Jacobs, 506.  
 Lowe v. Omaha, 269, 270.  
 Lowe v. Peers, 210.

(The figures refer to pages)

- Lowe v. Waller, 225.  
 Lowe v. Wing, 192.  
 Lowenstein v. Chappell, 45.  
 Lowenstein v. Monroe, 61, 135.  
 Lowery v. Rowland, 500.  
 Lowery v. Western Union Tel. Co., 404.  
 Loweth v. Smith, 125.  
 Lowndes v. Collens, 227.  
 Loyd v. Capps, 510.  
 Lucas v. Flinn, 142, 152, 177.  
 Lucas v. Michigan Cent. R. Co., 7, 308, 327.  
 Lucas v. Trumbull, 185.  
 Lucas v. Wattles, 256.  
 Luce v. Rochester Mut. Fire Ins. Co., 66.  
 Luce v. Hoisington, 112.  
 Luck v. Ripon, 102.  
 Ludlow v. Yonkers, 508.  
 Ludwick v. Huntsinger, 260.  
 Lueck v. Heisler, 319.  
 Lund v. New Bedford, 33.  
 Lund v. Tyler, 107, 130.  
 Lunsford v. Dietrich, 153.  
 Lunsford v. Walker, 152.  
 Lunt v. Philbrick, 153, 172.  
 Lunt v. Wrenn, 135.  
 Luse v. Jones, 41, 140.  
 Lustig v. New York, L. E. & W. R. Co., 484.  
 Luther v. Winnisimmet Co., 188, 500.  
 Lyle v. Barker, 190.  
 Lyles v. Lyles' Ex'rs, 300.  
 Lyles v. Western Union Tel. Co., 167, 168, 169.  
 Lylton v. Baird, 319.  
 Lyman v. Babcock, 217.  
 Lyman v. Shenandoah Social Club, 206.  
 Lynch v. Knight, 140, 141, 143, 149, 155, 167.  
 Lynde v. Thompson, 210, 213.  
 Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 57.  
 Lyon v. Bertram, 364.  
 Lyon v. Boston & M. R. R. Co., 424.  
 Lyon v. Gormley, 282.  
 Lyons v. Erie R. Co., 95.  
 Lyons v. Merrick, 55.  
 Lytton v. Baird, 136.
- M**
- McAdory v. Louisville & N. R. Co., 472.  
 McAfee v. Crofford, 55.  
 McAllister v. Chicago, R. I. & P. R. Co., 65.  
 McAllen v. Western Union Tel. Co., 170, 419.  
 McAllister v. Clement, 34, 36.  
 McAllister v. Reab, 229.  
 McAneany v. Jewett, 14.  
 McArthur v. Barnes, 319.  
 McBride v. McLaughlin, 315.  
 McBride v. Sunset Tel. Co., 160.  
 McCabe v. Morehead, 321.  
 McCabe v. Narragansett Electric Lighting Co., 465.  
 McCafferty v. Griswold, 511.  
 McCall v. McDowell, 152.  
 McCardle v. McGinley, 136.  
 McCarthy v. Clafflin, 487.  
 McCarthy v. De Armit, 312, 319.  
 McCarthy v. Niskern, 315.  
 McCarty v. Herryford, 523.  
 McCarty v. Quimby, 254.  
 McCarty v. St. Louis Transit Co., 487.  
 McCarver v. Doe ex dem. Herxberg, 496.  
 McChesney v. Wilson, 308.  
 McClanahan v. Porter, 498.  
 McClannahan v. Smith, 330.  
 McClendon v. Wells, 319.  
 McCleneghan v. Omaha & R. V. R. Co., 97.  
 McCloskey v. Moles, 59.  
 McClure v. Campbell, 159.  
 McColl v. Western Union Tel. Co., 404, 413.  
 McCollum v. Seward, 248.  
 McConnell v. Kibbe, 30, 32.  
 McConnell Bros. v. Slappey, 252.  
 McCormack v. Showalter, 504.  
 McCormick v. Hamilton, 352.  
 McCormick v. Pennsylvania Cent. R. Co., 185, 248, 254, 255.  
 McCormick v. Vanatta, 367.  
 McCoy v. Philadelphia, W. & B. R. Co., 327.  
 McCreeny v. Green, 246.  
 McCrubb v. Bray, 497.  
 McCullough v. Manning, 218.  
 McDaniel v. Crabtree, 110, 136.  
 McDaniel v. Needham, 177.  
 McDaniel v. Parks, 93.  
 McDermid v. Redpath, 358.  
 McDermott v. Severe, 149.  
 McDonald v. Champion Iron & Steel Co., 469, 486.  
 McDonald v. Hodge, 300.  
 McDonald v. Kansas City Bolt & Nut Co., 74, 77, 81.  
 McDonald v. North, 258.  
 McDonald v. Norton, 321.  
 McDonald v. Red Wing, 18.  
 McDonald v. Scaife, 254, 321.  
 McDonald v. Snelling, 53, 54, 61.

[The figures refer to pages]

- McDonald v. Unaka Timber Co., 273.  
 McDonald v. Walter, 339, 346.  
 McDougald v. Coward, 153.  
 McDougall v. Walling, 3.  
 McDowell v. France, The, 343.  
 McDowell v. Georgia R. R. Co., 422.  
 Mace v. Ramsey, 111.  
 Mace v. Reed, 325.  
 McElroy v. Goble, 33.  
 McFadden v. Hopkins, 192.  
 McGarv. Hastings, 515.  
 McGhee v. McCarley, 434.  
 McGhee v. Willis, 486.  
 McGorrah v. New York, N. H. & H. R. Co., 139.  
 McGovern v. New York Cent. & H. R. Co., 422, 451.  
 McGown v. International & G. N. R. Co., 430, 488.  
 McGowan v. St. Louis Ore & Steel Co., 426, 429, 435.  
 McGrath v. Gagner, 356.  
 McGregor v. Kilgore, 283, 373.  
 McGregor v. Western Union Tel. Co., 396.  
 McGrew v. Harmon, 193.  
 McGuckin v. Milbank, 519.  
 McGuffey v. Humes, 518.  
 McGuinness v. Whalen, 512.  
 McGuire v. Bloomington, 17.  
 McGuire v. Galligan, 247.  
 McGuire v. Grant, 502.  
 McHenry v. Marr, 519.  
 McHose v. Fulmer, 47, 91, 358, 359.  
 McIlvaine v. Wilkins, 229.  
 McIlwaine v. Metropolitan St. R. Co., 444.  
 McInerney v. Wain, 115.  
 McInhill v. Odell, 297.  
 McInnis v. Lyman, 185, 513.  
 McInroy v. Dyer, 186, 251.  
 McIntire v. Clark, 329.  
 McIntosh v. Lee, 37.  
 McIntyre v. Giblin, 152.  
 McIntyre v. New York Cent. R. Co., 32, 483, 486.  
 McIntyre v. Sholty, 313.  
 Mack v. South Bound R. Co., 147, 148.  
 McKay v. Henderson, 55.  
 McKay v. New England Dredging Co., 424, 426, 429, 430, 433, 436, 465, 469.  
 McKay v. Ohio River R. Co., 382, 384.  
 Mackay v. Western Union Tel. Co., 80, 404, 413.  
 McKee v. Judd, 3.  
 McKeever v. Market St. R. Co., 431.  
 McKeigue v. Janesville, 476, 477.  
 McKenney v. Haines, 246.  
 McKensie v. Farrell & Higgins, 331.  
 McKenzie v. Mitchell, 131, 132.  
 McKercher v. Curtis, 356.  
 Mackey v. Harmon, 517.  
 McKim v. Bartlett, 32.  
 McKim v. Blake, 239.  
 McKinley v. Chicago & N. W. R. Co., 101, 156, 170.  
 McKinnon v. McEwan, 109.  
 McKinnon v. Penson, 23.  
 McKnight v. Dunlop, 248.  
 McKnight v. Ratcliff, 112.  
 McLaughlin v. Corry, 138.  
 McLean v. Lewiston, 340.  
 McLean County Coal Co. v. Long, 501.  
 McLees v. Felt, 331.  
 McLendon v. Anson County Com'rs, 265.  
 McLeod v. Boulton, 21.  
 McLimans v. Lancaster, 239.  
 McMahan v. Bowe, 494.  
 McMahon v. Dubuque, 274, 278.  
 McMahon v. Field, 379.  
 McMahon v. New York & E. R. Co., 245, 246, 249.  
 McMaster v. State, 246, 247, 248.  
 McMichael v. Mason, 188.  
 McMullen v. Dickinson Co., 118.  
 McNair v. Compton, 511.  
 McNamara v. Clintonville, 46, 102.  
 McNamara v. King, 303, 316, 319.  
 McNeill v. Reid, 111.  
 McNitt v. Clark, 205.  
 Macomber v. Dunham, 260.  
 Macon County v. Rodgers, 260.  
 McPeck v. Western Union Tel. Co., 110, 391.  
 McPherson v. Ryan, 318, 522, 525.  
 McQueen v. Fulgham, 153.  
 MacVeagh v. Bailey, 61.  
 McWhorter v. Sayre, 329.  
 McWilliams v. Hoban, 153, 319.  
 Magdeburg General Ins. Co. v. Paulson, 373.  
 Magee v. Holland, 154, 322.  
 Magee v. Lavell, 215.  
 Magner v. Renk, 137.  
 Magnin v. Dinsmore, 371.  
 Maher v. Winona & St. P. R. Co., 37.  
 Mahoney v. Belford, 153, 171, 175.  
 Mahoney v. Dankwart, 148.  
 Mahurin v. Bickford, 238.  
 Main v. King, 210, 213.  
 Mairs v. Manhattan Real Estate Ass'n, 251, 254.

[The figures refer to pages]

- Malsenbacker v. Society Concordia,** 134, 325, 326.  
**Maitland v. Goldney,** 181.  
**Maleverer v. Spinke,** 18.  
**Malin & Browder v. McCutcheon,** 334.  
**Malone v. Hawley,** 170.  
**Malone v. Murphy,** 153.  
**Malott v. Shimer,** 487.  
**Malueg v. Hatten,** 75.  
**Managers of Metropolitan Asylum Dist. v. Hill,** 16, 17.  
**Maner v. Wilson,** 200.  
**Mangalore, The,** 373.  
**Mangan v. Foley,** 436.  
**Manhattan Life Ins. Co. v. Wright,** 205, 206.  
**Manice v. Brady,** 214.  
**Mann, Succession of,** 231.  
**Mann v. Cross,** 268.  
**Mann Boudoir-Car Co. v. Dupre,** 46.  
**Mann's Ex'rs v. Taylor,** 238.  
**Manning v. Fitch,** 83.  
**Manning v. Port Henry Iron Ore Co. of Lake Champlain,** 478.  
**Mansfield v. New York Cent. & H. R. R. Co.,** 245, 246, 252.  
**Mansfield Coal & Coke Co. v. McEnery,** 442.  
**Mansur & Tebbetts Implement Co. v. Tissier Arms & Hardware Co.,** 218.  
**Manter v. Truesdale,** 104.  
**Manville v. Western Union Tel. Co.,** 408.  
**Marble v. Chapin,** 153.  
**Marble v. Worcester,** 60.  
**Marburg v. Marburg,** 299.  
**March v. Walker,** 430, 435.  
**Marcy v. Fries,** 188, 507.  
**Margaret, The, v. Connestoga,** 133.  
**Margraf v. Muir,** 511.  
**Mariani v. Dougherty,** 487.  
**Marietta Iron Works v. Lottimer,** 260.  
**Marine Bank v. Fulton Bank,** 297.  
**Markham v. Jaudon,** 290.  
**Markham v. Russell,** 153.  
**Markley v. Duncan,** 119.  
**Marks v. Long Island R. Co.,** 107.  
**Marlow v. Lajeunesse,** 104.  
**Marquette, H. & O. R. Co. v. Langton,** 371.  
**Marr v. Western Union Tel. Co.,** 408, 417.  
**Marr's Adm'r v. Prather,** 299.  
**Marsh v. Fraser,** 249.  
**Marsh v. McPherson,** 356.  
**Marshall v. Anderson,** 498.  
**Marshall v. Betner,** 134, 309.  
**Marshall v. Clark,** 358, 361.  
**Marshall v. Consolidated Jack Mines Co.,** 430.  
**Marshall v. Dudley,** 230.  
**Marshall v. New York Cent. R. Co.,** 372.  
**Marshall v. Schricker,** 228.  
**Martin v. Franklin,** 209.  
**Martin v. Leslie,** 311, 316.  
**Martin v. Long,** 513, 514.  
**Martin v. Meles,** 99.  
**Martin v. Porter,** 283, 502.  
**Martin v. State,** 248.  
**Martindale v. Smith,** 355.  
**Mary, The,** 17.  
**Marzetti v. Williams,** 32.  
**Mason v. Callender,** 262, 264.  
**Mason v. Decker,** 355.  
**Mason v. Hawes,** 134.  
**Mason v. Macon Ry. & Light Co.,** 334.  
**Mason v. Union Pac. R. Co.,** 424.  
**Massie v. State Nat. Bank,** 520.  
**Massuere v. Dickens,** 21.  
**Masters v. Warren,** 149.  
**Masterton v. Brooklyn,** 103, 104, 106, 111, 352, 360.  
**Masterton v. Mt. Vernon,** 102, 107.  
**Matheis v. Mazet,** 154, 322.  
**Mather v. American Exp. Co.,** 48, 79, 377.  
**Mather v. Kinike,** 298.  
**Mather v. Rillston,** 343.  
**Mathew v. Wabash R. Co.,** 138.  
**Mathews v. Sharp,** 215.  
**Matteson v. New York Cent. R. Co.,** 150, 151, 170.  
**Matthews v. Coe,** 290.  
**Matthews v. Missouri Pac. R. Co.,** 187, 283.  
**Matthews v. Terry,** 18.  
**Matthews v. Warner's Adm'r,** 432, 434.  
**Mattingly v. Boyd,** 258.  
**Mattingly v. Darwin,** 331.  
**Maul v. Drexel,** 269, 270.  
**Maury v. Coyle,** 253.  
**Maxwell v. Allen,** 210.  
**Maxwell v. Kennedy,** 320.  
**May v. Crawford,** 199, 209.  
**May v. West Jersey & S. R. Co.,** 426, 468.  
**Mayer v. Duke,** 317, 349.  
**Mayer v. Frobe,** 302, 309, 323.  
**Mayer v. Reed,** 259.  
**Maynard v. Pease,** 294.  
**Mayo v. Springfield,** 185, 187.  
**Mayo v. Wahlgreen,** 239.  
**Mayor v. Frobe,** 302.  
**Mead v. Stratton,** 67.  
**Mead v. Wheeler,** 210, 236.  
**Mead v. Young,** 156.  
**Meaders v. Gray,** 260.

[The figures refer to pages]

- Meagher v. Driscoll, 145, 158, 503.  
Mears v. Corbwall, 191.  
Mechanics' & Traders' Bank of Buffalo v. Farmers' & Mechanics' Nat. Bank of Buffalo, 190.  
Meech v. Smith, 229.  
Meech v. Stoner, 3.  
Meibus v. Dodge, 315.  
Meidel v. Anthis, 311.  
Meighan v. Birmingham Terminal Co., 188, 311.  
Melcher v. Scruggs, 160, 172.  
Melchert v. American Union Tel. Co., 399.  
Mellor v. Spateman, 31, 35.  
Melvin v. Chancy, 25.  
Memphis & C. Packet Co. v. Nagel, 325.  
Memphis & C. R. Co. v. Reeves, 56, 62.  
Memphis & C. R. Co. v. Whitfield, 149, 151, 314.  
Memphis & L. R. Co. v. Walker, 276.  
Mendelsohn v. Anaheim Lighter Co., 324, 327.  
Menges v. Milton Piano Co., 208.  
Menkens v. Menkens, 275.  
Mentzer v. Western Union Tel. Co., 144, 160, 165.  
Mercer v. Vose, 248.  
Mercer's Adm'r v. Beale, 238.  
Merest v. Harvey, 302.  
Merica v. Burget, 202, 209, 211, 217.  
Merrick v. Brainard, 373.  
Merrick v. Wiltse, 366.  
Merrifield v. Longmire, 266.  
Merrill v. Dibble, 38.  
Merrill v. Merrill, 204.  
Merrill v. Western Union Tel. Co., 397.  
Merrills v. Tariff Mfg. Co., 174, 303.  
Merrimack Mfg. Co. v. Quintard, 358.  
Merriman v. McComick Harvesting Mach. Co., 357.  
Merryman v. Criddle, 246.  
Meserve v. Ammidon, 300.  
Meserve v. Snell, 516.  
Meshke v. Van Doren, 287.  
Messmore v. New York Shot & Lead Co., 82, 361.  
Metallic Compression Casting Co. v. Fitchburg, 18.  
Metcalf v. Baker, 102.  
Metropolitan Asylum Dist. v. Hill, 18.  
Metropolitan Bank v. Van Dyck, 296.  
Metropolitan El. R. Co. v. Kneeland, 275.  
Meyer v. Bohlfling, 323.  
Meyer v. Roosevelt, 296.  
Miamisburg Twine & Cordage Co. v. Wohlhuter, 366.  
Michaels v. New York Cent. R. Co., 63.  
Michaelson v. Denison, 17.  
Michigan Land & Iron Co. v. Deer Lake Co., 501, 504.  
Michigan Southern & N. I. R. Co. v. Caster, 372.  
Mickles v. Hart, 33.  
Micklewait v. Western Union Tel. Co., 398.  
Middlekauff v. Smith, 98, 109.  
Middleton v. Jerdee, 36, 37.  
Mihills Mfg. Co. v. Day, 360.  
Milbank v. Dennistown, 251.  
Milbous v. Atlantic Coast Line R. Co., 77.  
Miles v. Edwards, 135.  
Miles v. Miller, 337, 356.  
Millard v. Brown, 315.  
Miller v. Baltimore & O. S. W. R. Co., 148.  
Miller v. Bank of New Orleans, 259.  
Miller v. Burroughs, 260.  
Miller v. Edwards, 261.  
Miller v. Grice, 177.  
Miller v. Hall, 261.  
Miller v. Hayes, 529.  
Miller v. Jannett, 282.  
Miller v. Kempner, 262.  
Miller v. Kirby, 312.  
Miller v. Melchoer, 494.  
Miller v. Rosier, 522, 523, 529.  
Miller v. Roy, 153.  
Miller v. St. Louis, I. M. & S. R. Co., 66.  
Miller v. Trustees of Mariner's Church, 89, 337, 338, 358.  
Miller v. Weeks, 330.  
Miller v. Wellman, 501.  
Mills v. Fox, 215.  
Mills v. Jefferson, 266.  
Mills v. Paul, 212.  
Milwaukee & M. R. Co. v. Finney, 328.  
Milwaukee & St. P. R. Co. v. Arms, 7, 40, 302.  
Milwaukee & St. P. R. Co. v. Kellogg, 50, 52, 53, 54, 66.  
Minard v. Beans, 223.  
Minnesota Threshing Mach. Co. v. McDonald, 351.  
Minor v. The Picayune, 103.  
Mississippi Cent. R. Co. v. Kennedy, 377.

[The figures refer to pages]

- Mississippi & R. River Boom Co. v. Patterson, 271.  
 Mississippi & T. R. Co. v. Ayres, 477.  
 Missouri, K. & T. R. Co. v. Clifton, 376.  
 Missouri, K. & T. R. Co. v. Ft. Scott, 111.  
 Missouri, K. & T. R. Co. v. McGhee, 505.  
 Missouri, K. & T. R. Co. of Texas v. Lightfoot, 144.  
 Missouri Pac. R. Co. v. Dwyer, 348.  
 Missouri Pac. R. Co. v. Henry, 469.  
 Missouri Pac. R. Co. v. Kaiser, 157.  
 Missouri Pac. R. Co. v. Lee, 467, 482.  
 Missouri Pac. R. Co. v. Lehmberg, 445.  
 Missouri Pac. R. Co. v. Peay, 342.  
 Missouri Pac. R. Co. v. Perego, 460, 476.  
 Mitchell v. Billingsley, 500.  
 Mitchell v. Burch, 90.  
 Mitchell v. Clarke, 61.  
 Mitchell v. Cornell, 111.  
 Mitchell v. Freedley, 497.  
 Mitchell v. Jenkins, 25.  
 Mitchell v. Mitchell, 494.  
 Mitchell v. New York Cent. & H. R. R. Co., 450, 484.  
 Mitchell v. Rochester R. Co., 12, 147.  
 Mitchell v. Stanley, 517.  
 Mize v. Glenn, 32.  
 Mizner v. Frazier, 104.  
 Mobile & M. R. Co. v. Ashcraft, 314.  
 Mobile & M. R. Co. v. Jurey, 254, 373.  
 Mobile & O. R. Co. v. Matthews, 114.  
 Mobley v. Davega, 261.  
 Moellering v. Evans, 502.  
 Mogul S. S. Co. v. McGregor, 17, 25.  
 Mollie Gibson Consol. Min. & Mill. Co. v. Sharp, 451.  
 Mondel v. Steel, 364.  
 Mondon v. Western Union Tel. Co., 396.  
 Monmouth Park Ass'n v. Wallis Iron Works, 212.  
 Monmouth Park Ass'n v. Warren, 198.  
 Monnett v. Sturges, 260.  
 Monville v. Worcester, 184.  
 Monroe v. Lattin, 111.  
 Montana R. Co. v. Warren, 271.  
 Montgomery v. Locke, 500.  
 Montgomery v. Reed, 513.  
 Montgomery v. Tutt, 267.  
 Montgomery & E. R. Co. v. Mallette, 149.  
 Monticello v. Mollison, 187.  
 Moody v. Whitney, 253.  
 Moore v. Aldrich, 281.  
 Moore v. Colt, 211, 218.  
 Moore v. Crose, 312, 313.  
 Moore v. Davis, 56.  
 Moore v. Fleming, 299.  
 Moore v. Hall, 120, 270.  
 Moore v. Hopkins, 531.  
 Moore v. Hylton, 205.  
 Moore v. New York El. R. Co., 251.  
 Moore v. Patton, 249.  
 Moore v. Tracy, 30.  
 Moore v. Voughton, 226.  
 Moore's Adm'r v. Minerva, 101.  
 Morehouse v. Comstock, 364.  
 Moreland v. Lawrence, 260.  
 Morey v. Metropolitan Gaslight Co., 108.  
 Morey v. Morning Journal Ass'n, 182.  
 Morford v. Ambrose, 230.  
 Morgan v. Curley, 152, 171.  
 Morgan v. Durfee, 435.  
 Morgan v. Gregg, 290.  
 Morgan v. Kidder, 184.  
 Morgan v. Negley, 79.  
 Morgan v. Ross, 154.  
 Morgan v. Southern Pac. R. Co., 343, 431.  
 Morgan v. Varick, 494.  
 Morhard v. Richmond Light & R. Co., 487.  
 Morley v. Railroad Co., 446.  
 Morrell v. Irving Fire Ins. Co., 222.  
 Morris v. Chicago, B. & Q. R. Co., 139.  
 Morris v. Chicago, M. & St. P. R. Co., 462.  
 Morris v. Duncan, 311.  
 Morris v. Grand Ave. R. Co., 186.  
 Morris v. Knight, 508.  
 Morris v. McCoy, 206.  
 Morris v. Metropolitan St. R. Co., 468.  
 Morris v. Phelps, 513.  
 Morris v. Platt, 19, 27.  
 Morris v. Price, 135.  
 Morris v. St. Paul City R. Co., 138.  
 Morris v. Western Union Tel. Co., 399.  
 Morrison v. Davis, 56, 62.  
 Morrison v. I. & V. Florio S. S. Co., 373, 374.  
 Morrison v. Press Pub. Co., 180.

[The figures refer to pages]

- Morrison v. Robinson, 494, 496.  
Morse v. Chesapeake & O. R. Co., 143.  
Morse v. Rice, 236.  
Morse v. Sherman, 354.  
Mosely v. Anderson, 279.  
Moses v. Rasin, 357.  
Moses v. Wallace, 510.  
Mote v. Railroad Co., 254.  
Mott v. Mott, 211.  
Moulton v. Sanford, 43, 60.  
Mounson v. Redshaw, 235.  
Mountford v. Willes, 226.  
Mouse's Case, 18.  
Mowry v. Bishop, 264, 267.  
Moyer v. Gordon, 145, 159.  
Mueller v. Kleine, 211, 212.  
Muenchow v. Roberts, 509.  
Mulcahey v. Givens, 67.  
Mulcairns v. Janesville, 447.  
Muldoon v. Rickey, 25.  
Muldowney v. Railway Co., 170.  
Mulford v. Clewell, 154.  
Mullett v. Mason, 84.  
Mulligan v. Smith, 236.  
Mullin v. Spangenberg, 316.  
Mumford v. Keet, 514.  
Mundy v. Culver, 213, 219.  
Munroe v. Stickney, 502, 507.  
Munro Pac. Coast Dredging & Reclamation Co., in re, 431.  
Munsell v. Lewis, 3.  
Munson v. Munson, 184.  
Munter v. Bande, 312.  
Murdock v. Boston & A. R. Co., 379, 382.  
Murphey v. Western & A. R. Co., 156.  
Murphy v. Central Park, N. & E. R. Co., 328.  
Murphy v. Evans, 330.  
Murphy v. Fond Du Lac, 14, 33, 187.  
Murphy v. Hobbs, 185, 309, 322.  
Murphy v. Larson, 315.  
Murphy v. New York & N. H. R. Co., 433, 437, 439.  
Murray v. Buell, 342.  
Murray v. Burling, 186.  
Murray v. Doud, 246, 351.  
Murray v. Stanton, 273.  
Murray v. Ware's Adm'r, 248.  
Musgrave v. Beckendorff, 285, 292.  
Musick v. Latrobe, 138.  
Muskegon Curtain-Roll Co. v. Keystone Mfg. Co., 353.  
Musselman v. Barker, 162.  
Mutual Life Ins. Co. v. Hargus, 325.  
Myer v. Hart, 199.  
Myer v. Wheeler, 285.  
Myers v. Burns, 520.  
Myers v. Dresden, 22.  
Myers v. San Francisco, 431.  
Mygatt v. Wilcox, 247.  
Mynning v. Detroit, L. & N. R. Co., 429.
- N
- Nagel v. Missouri Pac. R. Co., 435, 456.  
Nagle v. Mullison, 316, 348.  
Nailor v. Ponder, 180.  
Nance v. Metcalf, 282.  
Nash v. Hamilton, 3.  
Nash v. Hermosilla, 208, 218.  
Nash v. Sharpe, 102.  
Nash v. Towne, 356.  
Nashville v. Comar, 119.  
Nashville v. First Nat. Bank, 265.  
Nashville C. & St. L. R. Co. v. Miller, 187.  
Nashville & C. R. Co. v. Prince, 437.  
Nashville & C. R. Co. v. Smith, 437.  
Nashville & C. R. Co. v. Stevens, 437.  
National Coal Tar Co. v. Malden & Melrose Gas Light Co., 358.  
National Copper Co. v. Minnesota Min. Co., 113, 114, 121, 124, 125, 126.  
National Fibre Board Co. v. Lewistown & A. Electric Light Co., 109.  
National Provincial Bank v. Marshall, 221.  
Nauman v. Cardwell, 290.  
Neal v. Wilmington & N. C. Electric R. Co., 441.  
Needham v. Grand Trunk R. Co., 430.  
Negley v. Cowell, 499.  
Negus v. Simpson, 253.  
Nehrbas v. Central Pac. R. Co., 431.  
Neiler v. Kelley, 292.  
Neiswanger v. Squier, 282.  
Nelson v. Branford Lighting & Water Co., 467, 486.  
Nelson v. Chicago, M. & St. P. R. Co., 68.  
Nelson v. Crawford, 12, 143, 148.  
Nelson v. Felder, 231, 238.  
Nelson v. Lake Shore & M. S. R. Co., 429, 430, 449, 477, 486.  
Nelson v. Plimpton Fireproof Elevating Co., 370.  
Nelson v. Wallace, 180.  
Nelson v. West Duluth, 503.  
Nennach v. Oregon & C. R. Co., 510.  
Nessle v. Reese, 212.



[The figures refer to pages]

- Nettles v. Barnett, 3.  
 Newark Coal Co. v. Upson, 108.  
 Newcomb v. Wallace, 32.  
 Newell v. Houlton, 262.  
 Newell v. Keith, 249.  
 Newell v. Smith, 254, 375.  
 Newell v. Whitcher, 152, 320.  
 New England Iron Co. v. Gilbert  
 El. R. Co., 354.  
 New England Mortg. Security Co.  
 v. Vader, 264.  
 New England No. 2, The, 381.  
 New Haven Steam-Boat Co. v. New  
 York, 56.  
 New Haven & N. Co. v. Hayden,  
 136.  
 New Jersey Exp. Co. v. Nichols,  
 102.  
 Newman v. Otto, 331.  
 Newman v. Stein, 153, 171.  
 Newman v. Western Union Tel.  
 Co., 166.  
 Newman v. Wolfson, 211.  
 New Orleans v. Gaines, 494, 495,  
 497.  
 New Orleans Draining Co. v. De  
 Lizardi, 253.  
 New Orleans, J. & G. N. R. R.  
 Co. v. Allbritton, 134, 309.  
 New Orleans, J. & G. N. R. Co. v.  
 Hurst, 317, 349, 380.  
 New Orleans, M. & T. R. Co. v.  
 Southern & A. Tel. Co., 36.  
 New Orleans, St. L. & C. R. Co.  
 v. Burke, 317, 348.  
 Newson's Adm'r v. Douglass, 235.  
 Newsom v. Newsom, 45.  
 Newton v. Kennerly, 259.  
 New York Academy of Music v.  
 Hackett, 79.  
 New York Bank Note Co. v. Ham-  
 ilton Bank Note Engraving &  
 Printing Co., 247.  
 New York Bank Note Co. v. Kid-  
 der Press Mfg. Co., 185.  
 New York, C. & St. L. R. Co. v.  
 Roe, 466.  
 New York Guaranty & Indemnity  
 Co. v. Flynn, 281.  
 New York Life Ins. Co. v. People,  
 326.  
 New York Market Gardeners' Ass'n  
 v. Adams Dry Goods Co., 47.  
 New York, N. H. & H. R. Co. v.  
 Ansonia Land & Water Power  
 Co., 250, 251.  
 New York Rubber Co. v. Rothery,  
 32.  
 New York & C. Mining Syndicate  
 & Co. v. Fraser, 56.  
 Nicholl v. Allen, 23.  
 Nichols v. Brabazon, 319.  
 Nichols v. Coleman, 239.  
 Nichols v. Eddy, 162.  
 Nichols v. Freeman, 509.  
 Nichols v. Haines, 216.  
 Nichols v. Walter, 513.  
 Nichols v. Winfrey, 435.  
 Nicholson v. Couch, 340.  
 Nicholson v. Rogers, 313, 320.  
 Nickerson v. Bigelow, 486.  
 Nielson v. Read, 214.  
 Nightingale v. Scannell, 314, 315.  
 Niles v. Board of Com'rs of Sink-  
 ing Fund, 264, 267.  
 Nisbet v. Lawson, 237.  
 Nith, The, 371.  
 Nitro-Glycerine Case, 27.  
 Niver v. Rossman, 206, 217.  
 Nixon v. Stillwell, 500, 501.  
 Noble v. Ames Mfg. Co., 80.  
 Nobles v. Bates, 211.  
 Noel v. Whetstley, 368.  
 Nokken v. Avery Mfg. Co., 114.  
 Nolde v. Gray, 510.  
 Nones v. Northhouse, 130.  
 Noonan v. Hsley, 295, 300.  
 Nordhaus v. Peterson, 313.  
 Norfolk & P. R. Co. v. Ornsby,  
 131.  
 Norfolk & W. R. Co. v. Anderson,  
 328.  
 Norfolk & W. R. Co. v. Cheat-  
 wood's Adm'r, 432, 441.  
 Norfolk & W. R. Co. v. Marpole,  
 150.  
 Norfolk & W. R. Co. v. Phillip's  
 Adm'r, 477.  
 Norfolk & W. R. Co. v. Spencer's  
 Adm'r, 476.  
 Norman v. Rogers, 184.  
 Norman v. Winch, 514.  
 Normannia, The, 323.  
 Norris v. Hall, 257, 258.  
 Norris v. Philadelphia, 239.  
 Norris v. Southern Ry., Carolina  
 Division, 141, 148.  
 Norristown v. Moyer, 186.  
 North v. Johnson, 319.  
 North v. Phillips, 292.  
 North v. Turner, 3.  
 North & South Rolling Stock Co.  
 v. O'Hara, 214.  
 Northam v. Hurley, 32.  
 Northampton's Case, 181.  
 North Chicago Rolling Mill Co. v.  
 Morrissey, 482.  
 North Chicago St. R. Co. v. Brodie,  
 489.  
 Northern Transp. Co. v. Sellick,  
 254.  
 North Hudson County R. Co. v.  
 Booraem, 256.

[The figures refer to pages]

- North Missouri R. Co. v. Akers, 377.  
 North Pennsylvania R. Co. v. Adams, 265.  
 North Pennsylvania R. Co. v. Kirk, 465, 480.  
 North Point Consol. Irr. Co. v. Utah & S. L. Canal Co., 340.  
 North River Meadow Co. v. Christ Church at Shrewsbury, 236.  
 Northrup v. McGill, 183, 188.  
 Northwestern Fertilizing Co. v. Hyde Park, 17.  
 Northwest Transp. Co. v. Boston Marine Ins. Co., 43.  
 Norton v. Babcock, 516.  
 Norton v. Colgrove, 519.  
 Nossaman v. Rickert, 152, 323.  
 Notara v. Henderson, 373.  
 Notting Hill, The, 67.  
 Nova Scotia Telegraph Co. v. American Telegraph Co., 298.  
 Novion v. Hallett, 229.  
 Nowel v. Roake, 497.  
 Noyes v. Phillips, 200, 210.  
 Noyes v. Ward, 134.  
 Nutter v. Junction R. Co., 339.
- O
- Oakes v. Maine Cent. R. Co., 429, 433, 436.  
 Oakes v. Richardson, 230.  
 Oakland R. Co. v. Fielding, 154.  
 Oakley Mills Mfg. Co. v. Neese, 339.  
 Oates v. Bullock, 177.  
 Obermyer v. Nichols, 230.  
 O'Brien v. Anniston Pipe-Works, 212.  
 O'Brien v. Young, 231.  
 O'Callaghan v. Bode, 468.  
 Occidental Consol. Min. Co. v. Comstock Tunnel Co., 99, 100.  
 O'Connor v. Forster, 370.  
 O'Connor v. St. Louis, K. C. & N. R. Co., 505.  
 O'Connor v. Shannon, 500.  
 O'Connor v. Union R. Co., 486.  
 O'Donnell v. Rhode Island Co., 53, 95.  
 O'Donnell v. Rosenberg, 212.  
 O'Donoghue v. Carby, 276.  
 Oelrichs v. Spain, 133, 134.  
 O'Fallon Coal Co. v. Laguet, 429, 436.  
 Offutt v. Edwards, 132.  
 Ogden v. Gibbons, 334.  
 Ogden v. Marshall, 370.  
 Ogle v. Earl Vane, 358.  
 O'Hanlan v. Railway Co., 272.
- Ohio & M. R. Co. v. Hecht, 46, 139.  
 Ohio & M. R. Co. v. Judy, 342.  
 Ohio & M. R. Co. v. Volght, 482.  
 Ohio & M. R. Co. v. Wangelin, 489.  
 Ohio & M. R. N. Co. v. Dickerson, 187.  
 O'Horo v. Kelsey, 135.  
 O'Keefe v. Dyer, 214.  
 Olcese v. Fruit & Trading Co., 354.  
 Old Colony R. Co. v. Evans, 512.  
 Old Colony R. Co. v. Miller, 256.  
 Oldfield v. New York & H. R. Co., 429, 436, 454.  
 O'Leary v. Rowan, 336.  
 Oliphint v. Mansfield, 135.  
 Oliver v. Columbia, N. & L. R. Co., 380.  
 Oliver v. La Valle, 46, 60.  
 Olmstead v. Brush, 32.  
 Olmstead v. Hoy, 525.  
 Olson v. Sharpless, 356.  
 Olson v. Solverson, 522.  
 Omaha St. R. Co. v. Emminger, 132.  
 Omaha & Grant Smelting & Refining Co. v. Tabor, 501.  
 O'Malley v. St. Paul, M. & M. R. Co., 458.  
 O'Mara v. Hudson River R. Co., 454.  
 O'Neill v. Bookman, 266.  
 Opsahl v. Judd, 466.  
 Oriental Bank v. Tremont Ins. Co., 257.  
 O'Riley v. McChesney, 35.  
 Oritz v. Navarro, 523.  
 Ormsby v. Vermont Copper Min. Co., 276, 281.  
 Orr v. Churchill, 220.  
 Orth v. Featherly, 320.  
 Osborn v. Bank of United States, 257.  
 Osborn v. Gillett, 422, 423.  
 Osborne & Co. v. Ehrhard, 136.  
 Osbourne v. Hoiser, 235.  
 Osmun v. Winters, 174, 525.  
 Ossulston v. Yarmouth, 263.  
 Ottawa Gas Light & Coke Co. v. Graham, 131.  
 Ottenot v. New York, L. & W. R. Co., 122.  
 Oursler v. Baltimore & O. R. Co., 315.  
 Outhouse v. Outhouse, 276.  
 Overholt v. Vieths, 475.  
 Overton v. Bolton, 260.  
 Oviatt v. Pond, 254.  
 Owen v. Brockschmidt, 435, 439.  
 Owens v. Kansas City, St. J. & O. B. R. Co., 46, 139.

[The figures refer to pages]

Owsley v. Fowler, 159.  
Oxford v. Ellis, 293.

## P

- Pacific Exp. Co. v. Black, 162.  
Pacific Exp. Co. v. Darnell, 65.  
Pacific Pine Lumber Co. v. Western Union Tel. Co., 400.  
Pacific Sheet Metal Works v. Californian Canneries Co., 81, 361.  
Packard v. Slack, 56, 65.  
Paducah Lumber Co. v. Paducah Water-Supply Co., 47.  
Page v. Ford, 55.  
Page v. Fowler, 282.  
Page v. Newman, 225, 226, 227.  
Page v. Wells, 511.  
Page v. Wiple, 25.  
Page v. Yool, 325.  
Paine v. Caswell, 262.  
Paine v. Chicago, R. I. & P. R. Co., 171, 385.  
Paine v. Sherwood, 71, 359, 360.  
Palfrey v. Portland, S. & P. R. Co., 422.  
Palmer v. Andover, 60.  
Palmer v. Andrews, 529.  
Palmer v. Crook, 175.  
Palmer v. Gallup, 33.  
Palmer v. Mahin, 320.  
Palmer v. Mill, 331.  
Palmer v. Murray, 253.  
Palmer v. Stockwell, 248.  
Palmer v. Wylie, 330.  
Pana v. Bowler, 232, 265.  
Paposkey v. Munkwitz, 510.  
Parana, The, 375.  
Pardee v. Kanady, 354.  
Parham v. McMurray, 188.  
Parish v. Wheeler, 192.  
Park v. Chicago & S. W. R. Co., 506.  
Park v. Detroit Free-Press Co., 179.  
Park v. Northport Smelting & Refining Co., 100.  
Park v. Richardson & Boynton Co., 365.  
Park v. Wiley, 235.  
Parke v. Frank, 339.  
Parker v. Crowell & Spencer Lumber Co., 432.  
Parker v. Davis, 296.  
Parker v. Forehand, 523.  
Parker v. Griswold, 333.  
Parker v. Hutchinson, 227.  
Parker v. Meadows, 96.  
Parker v. Russell, 118.  
Parker v. Shackelford, 321.  
Parker v. Thompson, 231.  
Parkhurst v. Masteller, 153, 171, 305, 319.  
Parkinson v. Woulds, 515.  
Parks v. Alta California Tel. Co., 397.  
Parks v. Boston, 256.  
Parks v. Marshall, 299.  
Parks v. Morris Axe & Tool Co., 367.  
Parmelee v. Lawrence, 228.  
Parrott v. Den, 331.  
Parrott v. Housatonic R. Co., 254.  
Parrott v. Knickerbocker Ice Co., 255.  
Parshall v. Minneapolis & St. L. R. Co., 102.  
Parson v. Sexton, 364.  
Parsons v. Harper, 137, 152.  
Parsons v. Missouri Pac. R. Co., 426, 435, 451, 458, 482.  
Parsons v. Sutton, 91, 92, 359, 360.  
Paschal v. Owen, 446.  
Pasley v. Freeman, 10.  
Passinger v. Thorburn, 111, 366.  
Pastorius v. Fisher, 31.  
Patent Brick Co. v. Moore, 212.  
Paterson v. Chicago, M. & St. P. R. Co., 373.  
Patrick v. Colorado Smelting Co., 31.  
Patrick v. Greenway, 35.  
Patten v. Chicago & N. W. R. Co., 348.  
Patten v. Libbey, 337.  
Patterson v. Ely, 331.  
Patterson v. Illinois Cent. R. Co., 85.  
Patterson v. Stewart, 518.  
Patterson v. Wallace, 430.  
Patterson v. Westervelt, 33.  
Patton v. Garrett, 135, 309.  
Paul v. Dod, 354.  
Paul v. Frazier, 524.  
Paul v. New York, 237.  
Paul v. Slason, 21, 30, 34.  
Paulling v. Creagh's Adm'r, 264.  
Pauska v. Dans, 232.  
Pavey v. American Ins. Co., 347.  
Pavey Mfg. Co. v. Tobin, 364.  
Paxton v. Boyer, 19, 28.  
Payne v. Allen, 18.  
Payne v. Morgan's L. & T. R. & S. S. Co., 110.  
Peace River Phosphate Co. v. Graf-fin, 360.  
Pearce v. Hennessy, 260.  
Pearce v. Needham, 177.  
Pearsall v. Western Union Tel. Co., 394.  
Pearse v. Coaker, 497.  
Pearson v. Carr, 119.  
Pearson v. Williams' Adm'rs, 222.

[The figures refer to pages]

- Pease v. Smith, 253.  
 Peck v. Michigan City, 123, 128.  
 Peck v. Small, 315, 319.  
 Peckham Iron Co. v. Harper, 184, 309.  
 Pegram v. Stortz, 155, 309.  
 Peirce v. Rowe, 266.  
 Peltz v. Eichele, 107.  
 Pence v. Wabash R. Co., 138.  
 Pendergast v. McCaslin, 497.  
 Pendleton St. R. Co. v. Rahmann, 347.  
 Pennsylvania Coal Co. v. Nee, 456, 459.  
 Pennsylvania Coal Co. v. Sander-son, 13, 17.  
 Pennsylvania Co. v. Bray, 157.  
 Pennsylvania Co. v. Keane, 475.  
 Pennsylvania Co. v. Lilly, 438, 451, 492.  
 Pennsylvania Co. v. Marion, 187.  
 Pennsylvania Co. v. Roney, 19.  
 Pennsylvania Co. v. Roy, 316.  
 Pennsylvania R. Co. v. Adams, 465.  
 Pennsylvania R. Co. v. Allen, 139.  
 Pennsylvania R. Co. v. Bantom, 438, 451.  
 Pennsylvania R. Co. v. Butler, 430, 442.  
 Pennsylvania R. Co. v. Connell, 156, 171, 382, 385.  
 Pennsylvania R. Co. v. Dale, 102.  
 Pennsylvania R. Co. v. Goodman, 430, 449, 450.  
 Pennsylvania R. Co. v. Henderson, 436, 456.  
 Pennsylvania R. Co. v. Keller, 465.  
 Pennsylvania R. Co. v. Kelly, 154.  
 Pennsylvania R. Co. v. Ogier, 482.  
 Pennsylvania R. Co. v. Reichert, 222.  
 Pennsylvania R. Co. v. Spicker, 156.  
 Pennsylvania R. Co. v. Titusville & P. Plank Road Co., 370, 377.  
 Pennsylvania R. Co. v. Vandever, 433, 482.  
 Pennsylvania R. Co. v. Wabash, St. L. & P. R. Co., 58.  
 Pennsylvania R. Co. v. Zebe, 430, 438, 451, 460.  
 Pennsylvania S. V. R. Co. v. Ziemer, 251.  
 Pennsylvania Tel. Co. v. Varnau, 442.  
 Pennsylvania & O. Canal Co. v. Graham, 101, 171.  
 Pennypacker v. Jones, 110.  
 Penrice v. Penrice, 498.  
 People v. Central Pac. R. Co., 216, 221.  
 People v. New York, 236.  
 People v. Supervisors of Delaware, 247, 249.  
 People v. Sutter St. R. Co., 224.  
 Peoria Bridge Ass'n v. Loomis, 138.  
 Peoria M. & F. Ins. Co. v. Lewis, 235.  
 Pepper v. Southern Pac. Co., 430.  
 Pepper v. Western Union Tel. Co., 410, 416.  
 Peppercorn v. Black River Falls, 187.  
 Perham v. Coney, 185.  
 Perine v. Grand Lodge A. O. U. W., 237.  
 Perkins v. Fourniquet, 238.  
 Perkins v. Lyman, 206, 211.  
 Perkins v. Marrs, 282.  
 Perkins v. Missouri, K. & T. R. Co., 326.  
 Perkins v. Portland S. & P. R. Co., 372.  
 Perkins v. Towle, 321.  
 Perley v. Eastern R. Co., 45.  
 Perrott v. Shearer, 187.  
 Perry v. Howe Co-op. Creamery Co., 507.  
 Perry v. Pittsburgh Union Pass. R. Co., 156.  
 Perry v. Robinson, 341.  
 Perry v. Smith, 300.  
 Perry v. Taylor, 231, 280.  
 Perry v. Washburn, 238.  
 Perry County v. Selma, M. & M. R. Co., 238.  
 Perry Tie & Lumber Co. v. Reynolds, 47, 81, 82.  
 Perzell v. Shook, 215.  
 Peters v. Cooper, 351.  
 Peters v. Johnson, 50, 67.  
 Peterson v. Knoble, 155.  
 Peterson v. Middlesex & Somerset Traction Co., 328.  
 Peterson v. Western Union Tel. Co., 344, 419.  
 Petrie v. Columbia & G. R. Co., 439, 470.  
 Pettee v. Tennessee Mfg. Co., 109.  
 Pettigrew v. Summers, 259.  
 Pettis v. Bloomer, 212.  
 Phelin v. Kenderdine, 153.  
 Phelps v. Winona & St. P. R. Co., 444.  
 Phelps v. Detroit, 126.  
 Phelps v. New Haven & Northamp-ton Co., 118.  
 Phenix Ins. Co. v. Continental Ins. Co., 221.  
 Philadelphia Traction Co. v. Or-bann, 313, 317, 326, 328, 348.  
 Philadelphia, W. & B. R. Co. v. Hoeflich, 384.

[The figures refer to pages]

- Philadelphia, W. & B. R. Co. v. Larkin, 314, 321, 328.  
 Philadelphia, W. & B. R. Co. v. Quigley, 320.  
 Philadelphia & R. R. Co. v. Smith, 27.  
 Philbrook v. Eaton, 363.  
 Philip v. Heraty, 476.  
 Phillips, Appeal of, 292.  
 Phillips v. Dickerson, 68.  
 Phillips v. Dugan, 298.  
 Phillips v. Kelly, 323.  
 Phillips v. London & S. W. R. Co., 102, 346.  
 Phillips v. Railway Co., 346.  
 Phillips v. Reichert, 513.  
 Phillips v. Speyers, 281, 298.  
 Phillipotts v. Evans, 352.  
 Philpot v. Taylor, 135.  
 Phinney v. Baldwin, 260.  
 Phoenix Iron Co. v. U. S., 202.  
 Phye v. Manhattan R. Co., 68.  
 Picayune No. 2, The, 103.  
 Pickard v. Collins, 507.  
 Pickens v. McCoy, 261.  
 Pickering v. Pulsifer, 330.  
 Pickert v. Rugg, 293, 295.  
 Pickett v. Cook, 349.  
 Pickett v. Southern R. Co., 334.  
 Pierce v. Benjamin, 188.  
 Pierce v. Fuller, 211.  
 Pierce v. Getchell, 315.  
 Pierce v. Hosmer, 30.  
 Pierce v. Jung, 213.  
 Pierce v. Millay, 101, 170.  
 Pierce v. Proprietors of Swan Point Cemetery, 157.  
 Pierce v. Spader, 299.  
 Pierce v. Wagner, 506.  
 Pierro v. St. Paul & N. P. R. Co., 113, 114.  
 Pierson v. Eagle Screw Co., 133.  
 Pierson v. Finney, 330.  
 Piester v. Piester, 262.  
 Pike v. Dilling, 319.  
 Pindall v. Bank of Marietta, 267.  
 Pine Bluff Iron Works v. Boling & Bro., 78.  
 Pineo v. New York Cent. & H. R. R. Co., 485.  
 Pinkerton v. Manchester & L. R. R., 286.  
 Pinkerton v. Railroad Co., 295.  
 Piper v. Kingsbury, 79, 528.  
 Pitcher v. Livingston, 513, 516.  
 Pittsburg Coal Co. v. Foster, 109.  
 Pittsburgh, C. & St. L. R. Co. v. Thompson, 187.  
 Pittsburgh, C., C. & St. L. R. Co. v. Carlson, 114.  
 Pittsburgh, C., C. & St. L. R. Co. v. Hosea, 424.  
 Pittsburgh, C., C. & St. L. R. Co. v. Kinnare, 474, 475.  
 Pittsburg, C., C. & St. L. R. Co. v. Montgomery, 150.  
 Pittsburgh Coal Min. Co. v. Greenwood, 331.  
 Pittsburgh, C. & St. L. R. Co. v. Dewin, 338.  
 Pittsburgh, C. & St. L. R. Co. v. Heck, 352.  
 Pittsburgh, C. & St. L. R. Co. v. Lyon, 313, 314.  
 Pittsburgh, C. & St. L. R. Co. v. Sponier, 138, 340, 342.  
 Pittsburgh Southern R. Co. v. Taylor, 234, 250, 317, 348.  
 Pittsburgh & C. R. Co. v. Andrews, 138.  
 Pizzie v. Reid, 491.  
 Platt v. Brown, 132, 317.  
 Plumleigh v. Dawson, 38.  
 Plummer v. Harbut, 315.  
 Plummer v. Penobscot Lumbering Ass'n, 98, 99.  
 Plummer v. Rigdon, 509, 510.  
 Plummer v. Webb, 422.  
 Polhemus v. Heiman, 363, 364.  
 Pollard v. Porter, 31.  
 Pollitt v. Kerr, 499.  
 Pollitt v. Long, 109, 500.  
 Pollock v. Colglazure, 298.  
 Pollock v. Gantt, 61, 324, 336.  
 Polly v. McCall, 119.  
 Polykranas v. Krausz, 320.  
 Pomeroy v. Smith, 190.  
 Pond v. Harris, 136.  
 Pond v. Merrifield, 31.  
 Pond v. Metropolitan El. R. Co., 123.  
 Pool v. Southern Pac. Co., 442.  
 Pope v. Barrett, 228.  
 Poposkey v. Munkwitz, 97, 109, 520.  
 Porteous v. Hazel, 340.  
 Porter v. Delaware, L. & W. R. Co., 146, 150.  
 Porter v. Hannibal & St. J. R. Co., 150.  
 Porter v. Munger, 232.  
 Porter v. New England, The, 381.  
 Porter v. Pool, 365.  
 Porter v. Seiler, 320, 324.  
 Porter v. Travis, 512.  
 Portis v. Merrill, 262.  
 Posey v. Gamble, 292.  
 Postal Tel. Cable Co. v. Barwise, 400.  
 Postal Tel. Cable Co. v. Lathrop, 408, 412, 414, 416.  
 Postal Tel. Cable Co. v. Nichols, 391.

[The figures refer to pages]

- Postal Tel. Cable Co. v. Schaefer, 417.  
 Post Pub. Co. v. Hallam, 182.  
 Potomac Bottling Works v. Barber & Co., 356.  
 Potter v. Chicago & N. W. R. Co., 347, 430, 433, 437, 457, 461, 475, 487.  
 Potter v. McPherson, 209.  
 Potter v. Mellen, 36.  
 Potter v. Merchants' Bank, 276.  
 Potts v. Western Union Tel. Co., 168.  
 Poulton v. Lattimore, 363, 364.  
 Powell v. Burroughs, 209, 214.  
 Powell v. Salisbury, 55.  
 Power v. Harlow, 151.  
 Powers v. Council Bluffs, 123.  
 Pratt v. Davis, 319.  
 Pratt v. Pioneer Press Co., 347.  
 Pratt v. Pond, 315, 316, 348.  
 Prentiss v. Shaw, 176.  
 Prerogative, Case of, 18.  
 Prescott v. Robinson, 148.  
 Prescott v. Trueman, 518.  
 President, etc., of Baltimore & Y. Turnpike Road v. Boone, 313, 320, 326.  
 President, etc., Rensselaer Glass Factory v. Reid, 225.  
 Press Pub. Co. v. McDonald, 182, 320.  
 Press Pub. Co. v. Monroe, 311.  
 Preston v. Walker, 266.  
 Prestwood v. Carlton, 4, 39.  
 Price v. Green, 211.  
 Price v. Railway Co., 227.  
 Price v. Severn, 344.  
 Prichard v. Mulhall, 512.  
 Pridgen v. Andrews, 260.  
 Priestly v. Northern Indiana & C. R. Co., 109.  
 Priestly v. Railroad Co., 376.  
 Prime v. Eastwood, 143, 153.  
 Primrose v. Western Union Tel. Co., 80, 387, 388, 413, 414.  
 Prince v. State Mut. Life Ins. Co., 318.  
 Prindle v. Haight, 176.  
 Pritchard v. Hewitt, 345, 346.  
 Pritchett v. Boevey, 137.  
 Probate Court for District of Rutland v. Slason, 32.  
 Proprietors of Quincy Canal v. Newcomb, 23.  
 Prosser v. Callis, 21.  
 Prosser v. Jones, 47, 79.  
 Provost v. Jackson, 432.  
 Pruyn v. Milwaukee, 261.  
 Pujol v. McKinlay, 246.  
 Pullman Palace Car Co. v. Barker, 46, 379.  
 Pullman Palace Car Co. v. Fowler, 162.  
 Pullman Palace Car Co. v. McDonald, 162.  
 Pumpelly v. Phelps, 511.  
 Purcell v. St. Paul City Ry., 147, 148.  
 Purple v. Hudson R. R. Co., 3.  
 Pursell v. Fry, 248.  
 Putnam v. Glidden, 355.  
 Putney v. Lapham, 193.  
 Pym v. Railway Co., 447, 462, 472, 479, 485.
- Q**
- Quigley v. Central Pac. R. Co., 156, 171.  
 Quigley v. Railroad Co., 309.  
 Quill v. Southern Pac. Co., 431.  
 Quin v. Moore, 32, 454, 469.  
 Quinby v. Minnesota Tribune Co., 178.  
 Quincy Coal Co. v. Hood, 489.  
 Quinn v. Lloyd, 298.  
 Quinn v. Power, 484.  
 Quinn v. Scott, 180.  
 Quinn v. South Carolina R. Co., 326.  
 Quinn v. Van Pelt, 5.
- R**
- Rabb v. Patterson, 494.  
 Rafferty v. Erie R. Co., 471.  
 Ragland v. Wood, 236.  
 Railroads, The, 133, 303.  
 Rains v. St. Louis, I. M. & S. R. Co., 435, 438, 451.  
 Rajnowski v. Detroit B. C. & A. R. Co., 451, 456, 478.  
 Ralfe v. Boston & M. R. R., 187.  
 Ralph v. Crouch, 135.  
 Ralston v. The State Rights, 313.  
 Ramsey v. Hurley, 275.  
 Randall v. Carpenter, 135.  
 Randall v. Greenhood, 228.  
 Randall v. Hazleton, 13.  
 Randall v. Raper, 111, 366.  
 Randolph v. Bloomfield, 506.  
 Randolph v. Hannibal & St. J. R. Co., 145, 152.  
 Ransom v. New York & E. R. Co., 137, 139, 341.  
 Ranson v. Barton, 294.  
 Rash v. Jenne, 515.  
 Ratcliffe v. Evans, 22.  
 Ratteree v. Chapman, 234, 250.  
 Raupman v. Evansville, 135.  
 Ravary v. Railway Co., 431.  
 Ray v. Jeffries, 339.  
 Ray v. Light, 275.

[The figures refer to pages]

- Rayburn v. Day, 229.  
 Raymond v. Edelbrock, 217.  
 Raymond v. Traffarn, 331.  
 Raymond Bros. v. Green, 135.  
 Raynor v. Nims, 313, 315.  
 Raynor v. Valentin Blatz Brewing Co., 520.  
 Rea v. Harrington, 153, 315, 316, 320.  
 Rea v. Rea, 498.  
 Reab v. McAllister, 229.  
 Read v. Spaulding, 63.  
 Red v. City Council of Augusta, 108.  
 Redden v. Gates, 323.  
 Redding v. Godwin, 276.  
 Redfield v. Redfield, 313.  
 Redfield v. Ystalyfera Iron Co., 259.  
 Redmond v. American Mfg. Co., 253.  
 Reece v. Knott, 238.  
 Reed v. Clark, 162, 526, 527.  
 Reed v. Davis, 504.  
 Reed v. Ford, 143.  
 Reed v. Hanover Branch R. Co., 256.  
 Reed v. Maley, 156.  
 Reed v. Ohio & M. R. Co., 270, 271.  
 Reed v. State, 122, 123.  
 Reed v. Western Union Tel. Co., 398.  
 Reeder v. Purdy, 312, 313, 319.  
 Reese v. Miles, 366.  
 Reese v. Rutherford, 231.  
 Reese v. Western Union Tel. Co., 141, 166, 168.  
 Reeves v. Stipp, 206, 262.  
 Regan v. Chicago, M. & St. P. R. Co., 488, 490.  
 Reggio v. Braggiotti, 136, 137, 365.  
 Reid v. Fairbanks, 282.  
 Reid v. President, etc., of Rensselaer Glass Factory, 228.  
 Reilly v. Jones, 215.  
 Reilly v. Sicilian Asphalt Pav. Co., 115.  
 Reindel v. Schell, 212.  
 Reiser v. New York, 269.  
 Reiter v. Morton, 111.  
 Reiter-Connolly Mfg. Co. v. Hamlin, 465.  
 Reizenstein v. Clark, 317.  
 Remelee v. Hall, 118.  
 Renfro's Adm'r v. Hughes, 185, 292.  
 Renihan v. Wright, 75, 161, 163.  
 Renkert v. Elliott, 319.  
 Rennner v. Canfield, 67.  
 Rensselaer Glass Factory v. Reid, 230.  
 Republican Pub. Co. v. Conroy, 320.  
 Republican Pub. Co. v. Miner, 181.  
 Republican Pub. Co. v. Mosman, 153, 180.  
 Respublica v. Sparhawk, 18.  
 Retan v. Lake Shore & M. S. R. Co., 344.  
 Rex v. Smith, 10.  
 Rexter v. Starin, 88.  
 Reynolds v. Barr, 246.  
 Reynolds v. Braithwaite, 504.  
 Reynolds v. Chandler River Co., 99.  
 Reynolds v. Shuler, 186.  
 Rhea v. Newport N. & M. V. R. Co., 17.  
 Rhemke v. Clinton, 230, 253.  
 Rhodes v. Baird, 47, 362.  
 Rhodes v. Cleveland Rolling Mill Co., 352.  
 Rhodes v. Dunbar, 507.  
 Rice v. Council Bluffs, 150.  
 Rice v. Manley, 272.  
 Rice v. Rice, 155.  
 Rice v. Stowe, 3.  
 Rice v. Whitmore, 110.  
 Rich v. New York Cent. & H. R. R. Co., 10, 68.  
 Rich v. Seneca Falls, 265.  
 Richards v. Citizens' Natural Gas Co., 233, 240, 252.  
 Richards v. Edick, 210, 512.  
 Richards v. Iowa Homestead Co., 515.  
 Richards v. McPherson, 260.  
 Richards v. Marshman, 220.  
 Richards v. Rose, 346.  
 Richards v. Sandford, 346.  
 Richardson v. Chynoweth, 81, 359, 362.  
 Richardson v. Northrup, 110, 502.  
 Richardson v. Vermont Cent. R. Co., 16.  
 Richardson v. Woehler, 208.  
 Richmond v. Bronson, 230, 273.  
 Richmond v. Chicago & W. M. R. Co., 426, 464, 465.  
 Richmond v. Roberts, 522, 524.  
 Richmond v. Shickler, 319.  
 Richmond Gas Co. v. Baker, 131.  
 Richmond Hosiery Mills v. Western Union Tel. Co., 390.  
 Richmond Passenger & Power Co. v. Robinson, 150, 334.  
 Richmond & D. R. Co. v. Allison, 99, 101, 103, 110, 131.  
 Richmond & D. R. Co. v. Freeman, 434.  
 Richtmeyer v. Remsen, 3.  
 Rickert v. Snyder, 514, 516, 518.  
 Ricketts v. Chesapeake & O. R. Co., 328.

[The figures refer to pages]

- Ricketts v. Western Union Tel. Co., 161, 169.  
 Riddle v. McGinnis, 153, 172.  
 Ridenhour v. Kansas City Cable R. Co., 188.  
 Riech v. Bolch, 65.  
 Riewe v. McCormick, 309.  
 Riley v. Lee, 21.  
 Riley v. Martin, 282.  
 Riley v. Salt Lake Rapid Transit Co., 496.  
 Rilling v. Thompson, 259.  
 Rineer v. Collins, 511.  
 Rinehart v. Olwine, 354.  
 Ring v. Cohoes, 57, 58.  
 Ringhouse v. Keener, 495, 497.  
 Ripka v. Sergeant, 31.  
 Ripley v. Davis, 281.  
 Rippey v. Miller, 311.  
 Risley v. Andrew County, 237.  
 Ristine v. Blocker, 328.  
 Rittenhouse v. Independent Line of Telegraph, 394, 417.  
 Roades v. Larson, 844.  
 Roan v. Holmes, 498, 499.  
 Robbins v. Cheek, 231.  
 Robbins v. Hudson R. R. Co., 346.  
 Robbins v. Lincoln County Court, 237.  
 Robbins v. Packard, 275, 276.  
 Robel v. Chicago, M. & St. P. R. Co., 457.  
 Roberts v. Benjamin, 358.  
 Roberts v. Berdell, 276.  
 Roberts v. Cole, 110.  
 Roberts v. Mason, 134, 309, 323.  
 Roberts v. St. Louis Merchants' Land Imp. Co., 496.  
 Robertson v. Rochester Folding Box Co., 13.  
 Robeson v. Whitesides, 204, 221.  
 Robinett v. Morris' Adm'rs, 329.  
 Robinson v. Bakewell, 221.  
 Robinson v. Barrows, 253, 282.  
 Robinson v. Bland, 2, 226.  
 Robinson v. Burton, 322.  
 Robinson v. Centenary Fund & Preachers' Aid Soc., 210.  
 Robinson v. Corn Exch. Ins. Co., 230.  
 Robinson v. Craver, 529.  
 Robinson v. Goings, 311, 325.  
 Robinson v. Hall, 298.  
 Robinson v. Harman, 4, 510.  
 Robinson v. Hartridge, 281.  
 Robinson v. Heard, 509.  
 Robinson v. Kinney, 259.  
 Robinson v. Lemon, 138.  
 Robinson v. Merchants' Despatch Transp. Co., 254.  
 Robinson v. Stewart, 249.  
 Robinson v. Superior Rapid Transit R. Co., 316.  
 Robinson v. Waupaca, 345.  
 Robinson v. Weeks, 3.  
 Robison v. Rupert, 176.  
 Rockford, R. I. & St. L. R. Co. v. Delaney, 451.  
 Rockland Water Co. v. Tillson, 116.  
 Rockwood v. Allen, 29, 40.  
 Rodgers v. Ferguson, 314.  
 Rodley v. Seider, 155.  
 Rodocanachi v. Milburn, 371, 375.  
 Roeder v. Ormsby, 438.  
 Roehm v. Horst, 117, 353.  
 Rogers v. Bemus, 81, 110.  
 Rogers v. Henry, 317, 349.  
 Rogers v. Rajendro, 9.  
 Rogers v. Sample, 206.  
 Rogers v. Spence, 302.  
 Rogers v. West, 230.  
 Rogers v. Wilson, 177.  
 Rohrecht v. Marling's Adm'r, 109.  
 Rolfe v. Peterson, 198.  
 Rolin v. Steward, 82.  
 Romaine v. Van Allen, 288.  
 Rome R. Co. v. Sloan, 273.  
 Rook v. Rook, 514.  
 Rooney v. New York, N. H. & H. R. Co., 57.  
 Root v. Lowndes, 115.  
 Root v. Sturdivant, 152, 305, 319.  
 Rooth v. Wilson, 190.  
 Roper v. Johnson, 358.  
 Rose v. Belyea, 133.  
 Rose v. Bozeman, 293, 300.  
 Rose v. Bridgeport, 264, 266, 267.  
 Rose v. Des Moines Val. R. Co., 486, 487.  
 Rose v. King, 382.  
 Rose v. Lewis, 276.  
 Rose v. Miles, 504.  
 Rose v. Post, 135.  
 Rose v. Story, 317.  
 Rose v. Wynn, 109.  
 Rosenbaum v. Shoffner, 487.  
 Rosenberg v. Weekes, 238.  
 Rosenberger v. Marsh, 333.  
 Rosenfield v. Express Co., 372.  
 Rosenheimer v. Standard Gas Light Co., 506.  
 Roosevelt v. Hanold, 330.  
 Ross v. Great Northern R. Co., 139.  
 Ross v. Leggett, 41, 140, 152, 171, 177.  
 Ross v. Loescher, 209.  
 Ross v. Texas & P. R. Co., 459.  
 Ross v. Thompson, 32.  
 Roth v. Smith, 177.  
 Roughan v. Boston & L. Block Co., 367.  
 Rouse v. Detroit Electric Ry., 465.



[The figures refer to pages]

- Scott v. Sampson, 181.  
 Scott v. Shepherd, 19.  
 Scott Tp. v. Montgomery, 41, 102, 140, 171.  
 Scripps v. Reilly, 153, 171.  
 Scull v. Bridle, 282.  
 Seaboard Air Line Ry. v. O'Quin, 382.  
 Seaman v. Farmers' Loan & Trust Co., 461.  
 Searle v. Adams, 259.  
 Searle v. Kanawha & O. R. Co., 448.  
 Sears v. Conover, 3.  
 Sears v. Lyons, 302, 318.  
 Sears v. Seattle Consol. St. R. Co., 343.  
 Seat v. Moreland, 36.  
 Seaton v. Jamison, 498.  
 Second v. Railway Co., 446.  
 Sedalia Gaslight Co. v. Mercer, 16.  
 Seely v. Alden, 4, 190, 503.  
 Seger v. Barkhamsted, 149.  
 Seidensparger v. Spear, 35.  
 Seitz v. People's Sav. Bank, 514.  
 Seiden v. Cashman, 317, 343.  
 Seiden v. Preston, 259.  
 Selkirk v. Cobb, 281.  
 Sell v. Ward, 277, 278.  
 Sellar v. Clelland, 272.  
 Sellars v. Foster, 477.  
 Selleck v. French, 226.  
 Selleck v. Janesville, 95.  
 Selleck v. J. Langdon Co., 343.  
 Sellman v. Bowen, 498.  
 Semple v. Bank of British Columbia, 495.  
 Seneca Road Co. v. Auburn & R. R. Co., 34, 38.  
 Serensen v. Northern Pac. R. Co., 471, 491.  
 Serwe v. Northern Pac. R. Co., 156.  
 Sewall's Falls Bridge v. Fisk, 109.  
 Seward v. Vera Cruz, The, 424.  
 Seyfert v. Bean, 109.  
 Shaber v. St. Paul, M. & M. R. Co., 442.  
 Shafer v. Wilson, 503.  
 Shaffer v. Lee, 118.  
 Shannon v. Burr, 83.  
 Shannon v. Comstock, 93.  
 Shannon v. Jones, 153.  
 Sharp v. Pettit, 498.  
 Sharpe v. Lee, 262.  
 Shattuc v. McArthur, 153.  
 Shattuck v. Adams, 32.  
 Shaw v. Brown, 314.  
 Shaw v. Cumiskey, 506.  
 Shaw v. Etheridge, 119.  
 Shaw v. Hoffman, 109, 111.  
 Shaw v. Macon, 136.  
 Shaw v. Nudd, 356.  
 Shaw v. Picton, 225.  
 Shaw v. Railroad Co., 371.  
 Shaw v. Rigby, 260.  
 Shaw v. Smith, 366.  
 Shaw v. Wilkins' Adm'r, 509.  
 Shawhan v. Van Nest, 353.  
 Shay v. Thompson, 315, 320.  
 Sheahan v. Barry, 523, 524.  
 Sheehan v. Dalrymple, 298.  
 Sheehan v. Edgar, 101.  
 Sheel v. Appleton, 150, 151.  
 Sheets v. Joyner, 519.  
 Sheffield v. Page, 94.  
 Shefill v. Van Deusen, 22.  
 Sheik v. Hobson, 311.  
 Shelbyville Lateral Branch R. Co. v. Lewark, 111.  
 Sheldon v. Express Co., 191.  
 Shell v. Appleton, 138.  
 Shellabarger v. Morris, 145, 160.  
 Shelton v. Gill, 220.  
 Shenango & A. R. Co. v. Braham, 270.  
 Shepard v. Chicago, R. I. & P. R. Co., 156, 171, 385.  
 Shepard v. Milwaukee Gas-Light Co., 81.  
 Shepherd v. Johnson, 285.  
 Shepherd v. McQuilkin, 253.  
 Sherburne v. Hirst, 216.  
 Sherley v. Billings, 150.  
 Sherlock v. Alling, 480.  
 Sherman v. Dutch, 313.  
 Sherman v. Hudson River R. Co., 375.  
 Sherman v. Milwaukee, L. S. & W. R. Co., 120.  
 Sherman v. Rawson, 162, 521, 524, 525.  
 Sherman Center Town Co. v. Leonard, 88, 103, 104, 108.  
 Sherrill v. Western Union Tel. Co., 165, 169.  
 Sherrod v. Langdon, 55, 84.  
 Sherry v. Frecking, 347.  
 Shervill v. Western Union Tel. Co., 144.  
 Sherwood v. Chicago & N. W. R. Co., 151.  
 Shields v. Yonge, 422, 423.  
 Shiell v. McNitt, 219.  
 Shipley v. Hammond, 226.  
 Shipman v. Bailey, 261.  
 Shipman v. Horton, 33.  
 Shipman v. State, 247.  
 Shoemaker v. Sonju, 334.  
 Shook v. Peters, 324.  
 Shores v. Brooks, 315, 321.  
 Short v. Abernathy, 300.  
 Shotwell v. Wendover, 184.  
 Shreve v. Brereton, 214.

[The figures refer to pages]

- Shute v. Taylor, 203, 218, 219, 220.  
 Sickra v. Small, 181, 182.  
 Sieber v. Great Northern R. Co., 439, 464.  
 Sills v. Hawes, 348.  
 Silurian Mineral Springs Co. v. Kuhn, 104.  
 Silver v. Kent, 321.  
 Silverman v. St. Louis, I. M. & S. R. Co., 373.  
 Simmons v. Brown, 499, 500.  
 Simmons v. McConnell, 432.  
 Simone v. Rhode Island Co., 143, 147, 148.  
 Simons v. Burnham, 180.  
 Simons v. Busby, 172.  
 Simonson v. Blake, 331.  
 Simpkins v. Low, 276.  
 Simpson v. Alexander, 281, 282.  
 Simpson v. Black, 527.  
 Simpson v. Keokuk, 88, 97, 98.  
 Simpson v. New York, N. H. & H. R. Co., 278.  
 Simpson v. Railroad Co., 362.  
 Singer Mfg. Co. v. Holdfodt, 328.  
 Singer Mfg. Co. v. Potts, 37.  
 Single v. Schneider, 321, 501.  
 Singleton v. Kennedy, 314.  
 Singleton v. Lewis, 266.  
 Singleton's Adm'r v. Kennedy, 7.  
 Sinker v. Kidder, 109.  
 Sinne v. New York, 479.  
 Sioux City, etc., R. Co. v. Brown, 256.  
 Slippery v. Stewart, 246.  
 Sissing v. Beach, 155.  
 Sitton v. MacDonald, 56.  
 Skaaraas v. Finnegan, 509.  
 Skinner v. Pinney, 282.  
 Skinner v. Tinker, 111.  
 Slater v. Rink, 152.  
 Slater v. Sherman, 319.  
 Slatten v. Des Moines Valley R. Co., 16.  
 Sledge v. Reid, 110.  
 Sleight v. Ogle, 177.  
 Sloan v. Baird, 247.  
 Sloan v. Edwards, 45, 152, 315.  
 Sloane v. Southern California R. Co., 147, 148.  
 Sloggy v. Crescent Creamery Co., 37.  
 Sloman v. Walter, 221.  
 Sloss-Sheffield Steel & Iron Co. v. Holloway, 479.  
 Slosson v. Beadle, 210, 213, 222.  
 Small v. Douthitt, 261.  
 Smalley v. Smalley, 504.  
 Smalling v. Jackson, 99, 100.  
 Smeed v. Foord, 74, 78, 83, 860, 362.  
 Smethurst v. Woolston, 292, 357.  
 Smith v. Atchison, T. & S. F. R. Co., 145.  
 Smith v. Bagwell, 319, 323.  
 Smith v. Bergengren, 221, 222.  
 Smith v. Braun, 528.  
 Smith v. Chicago, C. & D. R. Co., 97.  
 Smith v. Cissel, 429.  
 Smith v. Compton, 523.  
 Smith v. Condry, 103.  
 Smith v. Dukes, 347.  
 Smith v. Dunlap, 294.  
 Smith v. Flanders, 83, 111, 258.  
 Smith v. German Bank, 258.  
 Smith v. Goodman, 322.  
 Smith v. Green, 56, 65, 84.  
 Smith v. Griffith, 275, 372.  
 Smith v. Holcomb, 152, 170, 174, 305.  
 Smith v. Houston, 339.  
 Smith v. Hughes, 514.  
 Smith v. Ingersoll Drill Co., 17.  
 Smith v. Louisville & N. R. Co., 425.  
 Smith v. Maben, 25.  
 Smith v. Matthews, 320.  
 Smith v. Meyers, 154.  
 Smith v. Morgan, 238.  
 Smith v. New York & N. H. R. Co., 3.  
 Smith v. O'Donnell, 55.  
 Smith v. Osborn, 65.  
 Smith v. Overby, 152, 172.  
 Smith v. Phillips, 192.  
 Smith v. Pittsburg, Ft. W. & C. R. Co., 157, 171.  
 Smith v. Postal Tel. Cable Co., 147.  
 Smith v. St. Paul, M. & M. R. Co., 47.  
 Smith v. Shaw, 299.  
 Smith v. Sherwood, 4.  
 Smith v. Sloss Marblehead Lime Co., 356.  
 Smith v. Smith, 60, 211.  
 Smith v. Snyder, 352.  
 Smith v. Sprague, 136.  
 Smith v. Stewart, 21.  
 Smith v. Strong, 513, 514.  
 Smith v. Sun Printing & Pub. Ass'n, 21.  
 Smith v. Thackerah, 14, 84.  
 Smith v. Thomas, 360.  
 Smith v. Thompson, 316, 348.  
 Smith v. Times Co., 343.  
 Smith v. Velie, 246.  
 Smith v. Wabash, St. L. & P. R. Co., 435, 445, 486.  
 Smith v. Western Union Tel. Co., 402, 403, 404, 405.  
 Smith v. Whitaker, 262.  
 Smith v. Whittier, 843.

[The figures refer to pages]

- Smith v. Wilmington & W. R. Co., 163.  
 Smith v. Woodfine, 8, 525.  
 Smith v. Wunderlich, 313.  
 Smith Lumber Co. v. Frith, 93.  
 Smith's Adm'r's v. Wainwright's Adm'r's, 211.  
 Smithwick v. Ward, 324.  
 Smith & Benham v. Curvan & Hussey, 131.  
 Snedecor v. Pope, 312.  
 Snell v. Cottingham, 82, 84.  
 Snell v. Delaware Ins. Co., 5.  
 Snodgrass v. Reynolds, 108.  
 Snow v. Carpenter, 317, 349.  
 Snow v. Grace, 318, 329.  
 Snow v. Nowlin, 239.  
 Soeder v. St. Louis, I. M. & S. R. Co., 446.  
 Solen v. Virginia & T. R. Co., 238.  
 Somers v. Wright, 519.  
 Sommerfield v. St. Louis Transit Co., 326.  
 Sopp v. Winpenny, 495.  
 So Relle v. Western Union Tel. Co., 144, 164.  
 Sorenson v. Dundas, 152.  
 Sorgenfrei v. Schroeder, 170.  
 Southard v. Rexford, 7, 524, 526, 528.  
 Southern Cent. R. Co. v. Moravia, 231, 260.  
 Southern Cotton Oil Co. v. Skipper, 139.  
 Southern Cotton Press & Mfg. Co. v. Bradley, 430, 436.  
 Southern Exp. Co. v. Brown, 325, 334.  
 Southern Kansas R. Co. v. Rice, 41, 140, 157, 318, 326.  
 Southern Marble Co. v. Darnell, 500.  
 Southern Pac. Co. v. Arnett, 246.  
 Southern Pac. Co. v. Hetzer, 149.  
 Southern R. Co. v. Covenia, 439.  
 Southern R. Co. v. Hawkins, 336.  
 Southern R. Co. v. Kendrick, 164, 317, 348.  
 Southern R. Co. v. Sittaseu, 50.  
 Southern R. in Kentucky v. Goddard, 138.  
 Southern R. in Kentucky v. Hawkins, 316.  
 South Gardiner Lumber Co. v. Bradstreet, 360.  
 South Penn. Oil Co. v. Stone, 320.  
 Southwestern R. Co. v. Paulk, 425.  
 Southwestern Telegraph & Telephone Co. v. Krause, 269.  
 Southwestern Telegraph & Telephone Co. v. Solomon, 160.  
 South & N. A. R. Co. v. McLendon, 138, 151, 170.  
 South & N. A. R. Co. v. Wood, 273, 371.  
 Sowers v. Sowers, 313, 320, 323, 324.  
 Soyer v. Great Falls Water Co., 442.  
 Spade v. Lynn & B. R. R., 47, 138, 143, 146, 147, 150.  
 Sparkman v. Western Union Tel. Co., 166.  
 Sparks v. Garrigue, 267.  
 Spaulding v. Lord, 262.  
 Spear v. Hiles, 316, 319.  
 Spear v. Smith, 204.  
 Spear v. Sweeney, 315.  
 Spellings v. Parks, 527.  
 Spencer v. Maxfield, 261.  
 Spencer v. Pierce, 235.  
 Spencer v. Vance, 281.  
 Sperier v. Ott, 154.  
 Spicer v. Chicago & N. W. R. Co., 348.  
 Spicer v. Hoop, 211.  
 Spicer v. Railroad Co., 151.  
 Spicer v. Waters, 281.  
 Spilman v. Roanoke Nav. Co., 120.  
 Spokane Truck & Dray Co. v. Hoefer, 306, 310, 322.  
 Sprague v. Brown, 186.  
 Sprague v. Craig, 523.  
 Sprague v. Griffin, 509.  
 Spring v. Haskell, 371.  
 Spring v. Russell, 13.  
 Springett v. Balls, 488.  
 Squire v. Western Union Tel. Co., 6, 81, 393, 404, 408.  
 Staal v. Grand Rapids & I. R. Co., 443, 475.  
 Staal v. Grand St. & N. R. Co., 101, 103.  
 Staats v. Ten Eyck's Heirs, 513, 514, 515.  
 Stacy v. Publishing Co., 311.  
 Stadler v. Grieben, 119.  
 Stafford v. Morning Journal Ass'n, 182.  
 Stafford v. Oskaloosa, 101, 329.  
 Stallings v. Whittaker, 153.  
 Standard Button-Fastening Co. v. Breed, 215.  
 Standlee v. St. Louis & S. W. R. Co., 444.  
 Stanfield v. Phillips, 336.  
 Stanley v. Montgomery, 219.  
 Stanley v. Powell, 28.  
 Stansell v. Western Union Tel. Co., 403.  
 Stanwood v. Flagg, 297.  
 Staples v. Parker, 218.  
 Starbird v. Barrows, 48.

[The figures refer to pages]

- Stark v. Coffin**, 297, 298.  
**Stark v. Olney**, 231.  
**Stark v. Starr**, 498.  
**Stark's Adm'r v. Price**, 230, 246.  
**Startup v. Cortazzi**, 98, 357.  
**State v. Autery**, 324.  
**State v. Baltimore & O. R. Co.**, 429, 459.  
**State v. Board of Education**, 18.  
**State v. Cadwallader**, 386.  
**State v. Corron**, 205.  
**State v. Davis**, 30, 33.  
**State v. Jackson**, 263.  
**State v. Howarth**, 266.  
**State v. Larson**, 205.  
**State v. Lott**, 236, 240.  
**State v. Multnomah County**, 238.  
**State v. Probate Court of North Dakota**, 439.  
**State v. Reinhardt**, 14.  
**State v. Steen**, 238.  
**State v. Stevens**, 323.  
**State v. Taylor**, 220.  
**State v. Van Winkle**, 238.  
**State v. Ward**, 61.  
**State v. Weinle**, 159.  
**State v. Weston**, 192.  
**State Rights, The**, 313.  
**States v. Durkin**, 107.  
**Staton v. Norfolk & C. R. Co.**, 27.  
**Staudenwire v. De Bardelahaen**, 508.  
**Stearns v. Washburn**, 354.  
**Steel v. Kurtz**, 430.  
**Steer v. Brown**, 203, 217.  
**Stephens v. Essex County Park Commission**, 212.  
**Stephens v. Hannibal & S. J. R. Co.**, 101.  
**Stephens v. Koonce**, 253.  
**Stephens v. White**, 331.  
**Stephenson v. Thayer**, 276.  
**Sterling v. Peet**, 516.  
**Stern v. People**, 235.  
**Sternfels v. Metropolitan St. R. Co.**, 442, 448, 472.  
**Stevens v. Barringer**, 258.  
**Stevens v. Dudley**, 66.  
**Stevens v. Gwathmey**, 258.  
**Stevens v. Low**, 184, 253.  
**Stevens v. Pillsbury**, 211.  
**Stevens v. Yale**, 36, 103, 108.  
**Stevenson v. Belknap**, 154, 322.  
**Stevenson v. Maxwell**, 512.  
**Stevenson v. Morris**, 134, 309.  
**Stevenson v. Smith**, 336.  
**Stevenson v. Telegraph Co.**, 413.  
**Stewart v. Bedell**, 211, 221.  
**Stewart v. Drake**, 518.  
**Stewart v. Grier**, 214.  
**Stewart v. McLaughlin's Estate**, 510.  
**Stewart v. Maddox**, 152, 323.  
**Stewart v. Minnesota Tribune Co.**, 178.  
**Stewart v. Ripon**, 46, 151, 171.  
**Stewart v. Schell**, 259.  
**Stickney v. Allen**, 184.  
**Still v. Hall**, 248.  
**Stillings v. Metropolitan St. R. Co.**, 487.  
**Stillwell v. Temple**, 215.  
**Stillwell & B. Mfg. Co. v. Phelps**, 356.  
**Stilson v. Gibbs**, 307.  
**Stimpson v. The Railroads**, 133, 303.  
**Stimson v. Farnham**, 33.  
**Stirling v. Garritee**, 282.  
**Stockbridge Iron Co. v. Cone Iron Works**, 501.  
**Stockely v. Thompson**, 267.  
**Stodghill v. Chicago, B. & Q. R. Co.**, 113, 121, 123.  
**Stoher v. St. Louis, I. M. & S. R. Co.**, 435, 448.  
**Stone v. Bennett**, 231.  
**Stone v. Codman**, 61.  
**Stony Creek Lumber Co. v. Fields & Co.**, 208.  
**Storey v. Early**, 175.  
**Storey v. Wallace**, 179.  
**Storrie v. Marshall**, 429.  
**Storrs v. Los Angeles Traction Co.**, 107, 130.  
**Stoudenmeier v. Williamson**, 251.  
**Stoughton v. Lynch**, 265.  
**Stout v. Prall**, 8, 524.  
**Stowe v. Heywood**, 154.  
**Stowell v. Lincoln**, 31, 33.  
**Stratton v. Dole**, 523.  
**Strawn v. Cogswell**, 109.  
**Streeper v. Williams**, 210.  
**Street v. Blay**, 364.  
**Street v. Nelson**, 292.  
**Streeter v. Rush**, 211.  
**Stribley v. Welz**, 523.  
**Stringer v. Coombs**, 298, 299.  
**Stringfield v. Hirsch**, 135.  
**Strohm v. New York, L. E. & W. R. Co.**, 101.  
**Strong v. Hooe**, 347.  
**Strong v. Stevens Point**, 459.  
**Strother v. South Carolina & G. R. Co.**, 426.  
**Strutzel v. St. Paul City R. Co.**, 458.  
**Stuart v. Binsse**, 235.  
**Stuart v. Pennis**, 509.  
**Stuart v. Western Union Tel. Co.**, 164, 420.  
**Studabaker v. White**, 203.  
**Stuebing v. Marshall**, 438.  
**Stull v. Graham**, 498.

[The figures refer to pages]

- Sturgeon v. St. Louis, K. C. & N. R. Co., 375.  
 Sturgess v. Bissell, 371.  
 Sturgis v. Frost, 137.  
 Stuts v. Chicago & N. W. R. Co., 138, 157, 171, 385.  
 Sullens v. Chicago, R. I. & P. R. Co., 499, 500.  
 Sullivan v. Anderson, 91.  
 Sullivan v. Lowell & D. St. R. Co., 175.  
 Sullivan v. McMillan, 94, 240, 241, 245.  
 Sullivan v. Oregon Ry. & Nav. Co., 325, 328.  
 Sullivan v. Tuck, 287.  
 Sullivan v. Union Pac. R. Co., 422.  
 Sullivan County v. Ruth, 57.  
 Summerfield v. St. Louis Transit Co., 382.  
 Summerfield v. Western Union Tel. Co., 141, 145, 155, 166.  
 Sumner v. Beebe, 236, 259.  
 Sumner v. Williams, 514.  
 Sunnyside Coal & Coke Co. v. Reitz, 501.  
 Sun Printing & Pub. Ass'n v. Moore, 209.  
 Surocco v. Geary, 13, 18.  
 Sutherland v. Wyer, 88, 93.  
 Sutro Tunnel Co. v. Segregated Belcher Min. Co., 232.  
 Suttle v. Hutchinson, 366.  
 Sutton v. Howard, 206.  
 Sutton v. Wauwatosa, 43.  
 Suydam v. Jenkins, 4, 280, 285, 286, 287, 357.  
 Swails v. Cissna, 239.  
 Swain v. Schieffelin, 367.  
 Swan v. Timmons, 135.  
 Swan v. Western Union Tel. Co., 394.  
 Swank v. Elwert, 174.  
 Swanscot Mach. Co. v. Partridge, 236.  
 Swarthout v. New Jersey Steamboat Co., 335.  
 Swartz v. Ballou, 516.  
 Sweeney v. Connaughton, 189.  
 Sweet v. Western Union Tel. Co., 402.  
 Swett v. Hooper, 236.  
 Swift, In re, 291.  
 Swift v. Broyles, 505.  
 Swift v. Dickerman, 153, 181.  
 Swift v. Eastern Warehouse Co., 84.  
 Swift v. Plessner, 135.  
 Swift v. Powell, 215.  
 Swift & Co. v. Bleise, 95.  
 Swift & Co. v. Johnson, 103, 422.  
 Swift & Co. v. Redhead, 99, 100.  
 Swinfin v. Lowry, 57.  
 Sykes v. Pawlet, 60.  
 Sykes v. Railroad Co., 463.  
 Sykora v. J. I. Case Threshing Mach. Co., 439.  
 Symes v. Oliver, 287.

## T

- Taber v. Hutson, 152, 156, 322.  
 Taber Lumber Co. v. O'Neal, 104.  
 Talbert v. Western Union Tel. Co., 165.  
 Talbott v. West Virginia, C. & P. R. Co., 39, 41.  
 Talcott v. Marston, 214, 260, 262.  
 Talfer v. Northern R. Co., 459.  
 Talladego Ins. Co. v. Peacock, 235.  
 Talliaferro's Ex'rs v. King's Adm'r, 266.  
 Tally v. Ayres, 44.  
 Tambaco v. Simpson, 186.  
 Tamke v. Vangness, 318, 530.  
 Tapling v. Jones, 11.  
 Tarleton v. McGawley, 61.  
 Tarpley v. Blabey, 178.  
 Tate v. Doe ex dem. Weir, 497.  
 Tate v. Field, 508.  
 Tathwell v. Cedar Rapids, 345.  
 Tatnall v. Courtney, 152.  
 Tatum v. Ackerman, 354.  
 Tatum v. Manning, 292.  
 Taul v. Everet, 206.  
 Tayloe v. Sandiford, 213.  
 Taylor v. Carpenter, 324.  
 Taylor v. Coolidge, 177.  
 Taylor v. Davis, 152.  
 Taylor v. Grand Trunk R. Co., 314.  
 Taylor v. Ketchum, 281.  
 Taylor v. Long Island R. Co., 486.  
 Taylor v. Metropolitan El. R. Co., 115.  
 Taylor v. Monroe, 336.  
 Taylor v. Morgan, 321.  
 Taylor v. Morton, 134.  
 Taylor v. Plymouth, 18.  
 Taylor v. Shelkett, 153.  
 Taylor v. Spencer, 75, 84.  
 Taylor v. Spokane Falls & N. R. Co., 270.  
 Taylor v. Taylor, 494.  
 Taylor v. Times Newspaper Co., 202, 208, 209.  
 Taylor v. Wallace, 515.  
 Taylor v. Whitehead, 18.  
 Taylor v. Wing, 261.  
 Taylor, B. & H. R. Co. v. Warner, 430, 486.  
 Teagarden v. Hetfield, 68, 337.  
 Telegraph, The, 371.  
 Templeman v. Fauntleroy, 258.

[The figures refer to pages]

- Tennessee Coal & R. Co. v. Roddy, 342, 438.  
 Tennessee Mfg. Co. v. James, 208, 213.  
 Tenney v. Smith, 177.  
 Tenth Nat. Bank v. New York, 231.  
 Terre Haute & I. R. Co. v. Brunker, 12.  
 Terre Haute & I. R. Co. v. Buck, 46, 66.  
 Terry v. Jewett, 479.  
 Terry v. New York, 189.  
 Terry's Ex'r v. Drabenstadt, 518.  
 Terwilliger v. Wands, 144, 153.  
 Tetherow v. St. Joseph & D. M. R. Co., 446.  
 Texas Mexican R. Co. v. Douglas, 150.  
 Texas Mexican R. Co. v. Douglass, 151.  
 Texas Trunk R. Co. v. Johnson, 324.  
 Texas W. R. Co. v. Gentry, 276.  
 Texas & N. O. R. Co. v. Green, 430.  
 Texas & P. R. Co. v. Armstrong, 164.  
 Texas & P. R. Co. v. Billingsly, 283.  
 Texas & P. R. Co. v. Geiger, 446.  
 Texas & P. R. Co. v. Hohn, 343.  
 Texas & P. R. Co. v. Lester, 466, 469.  
 Texas & P. R. Co. v. Levi, 187.  
 Texas & P. R. Co. v. Robertson, 442.  
 Texas & P. R. Co. v. Tankersley, 254.  
 Texas & P. R. Co. v. White, 96.  
 Texas & P. R. Co. v. Wilder, 451.  
 Texas & St. L. R. Co. v. Young, 110.  
 Thatcher v. Massey, 260.  
 Thayer v. Brooks, 120.  
 Thayer v. Wilmington Star Min. Co. of Coal City, 264.  
 Theiss v. Weiss, 357.  
 Thew v. Miller, 282.  
 Thibault v. Sessions, 179, 182.  
 Thill v. Pohlman, 317, 349.  
 Third Nat. Bank of Baltimore v. Boyd, 295.  
 Thirteenth & F. St. P. Ry. v. Boudron, 3.  
 Thomas v. Brackney, 35.  
 Thomas v. Sternheimer, 253.  
 Thomas v. Thomas' Ex'r, 496.  
 Thomas v. Utica & Black River R. Co., 484.  
 Thomas v. Weed, 229, 251.  
 Thomas v. Wells, 246.  
 Thomas, B. & W. Mfg. Co. v. Wash St. L. & P. R. Co., 65, 80, 91, 112.  
 Thompson v. Alger, 352.  
 Thompson v. Androscoggin River Imp. Co., 49.  
 Thompson v. Boston & M. R., 257.  
 Thompson v. Hoskins, 193.  
 Thompson v. Hudson, 205.  
 Thompson v. Johnston Bros. Co., 476.  
 Thompson v. Lumley, 331.  
 Thompson v. Pickel, 260.  
 Thompson v. Powning, 134.  
 Thompson v. Riggs, 297.  
 Thompson v. Shattuck, 88.  
 Thompson v. Western Union Tel. Co., 162, 165, 393.  
 Thoms v. Dingley, 365, 367, 368.  
 Thomson-Houston Electric Co. v. Durant Land Imp. Co., 519.  
 Thoresen v. La Crosse City Ry. Co., 476.  
 Thorn v. Knapp, 8, 162, 318, 521, 526, 530, 531.  
 Thorne v. McVeagh, 367.  
 Thornton v. Turner, 2.  
 Thornton-Thomas Mercantile Co. v. Bretherton, 293, 295.  
 Thoroughgood v. Walker, 217.  
 Thorp v. Bradley, 31, 37, 334.  
 Thorp v. Western Union Tel. Co., 393.  
 Thrall v. Knapp, 176.  
 Thrall v. Lathrop, 253.  
 Thrasher v. Tyack, 498.  
 Thurman v. Western Union Tel. Co., 165.  
 Thurston v. Hancock, 502.  
 Thurston v. Martin, 344.  
 Tice v. Munn, 46.  
 Tidman v. Ainslie, 181.  
 Tierney v. Whiting, 518.  
 Tilghman v. Proctor, 247.  
 Tilley v. Hudson River R. Co., 428, 429, 448, 483.  
 Tillinghast-Styles Co. v. Providence Cotton Mills, 85.  
 Tillman v. Morton, 266.  
 Tillotson v. Smith, 33.  
 Times Pub. Co. v. Carlisle, 326.  
 Tingley v. Cutler, 213.  
 Titus v. Corkins, 134, 309, 319.  
 Toale v. Western Union Tel. Co., 167, 169.  
 Tobin v. Missouri Pac. R. Co., 436.  
 Tobin v. Shaw, 162, 521, 524.  
 Tobler v. Austin, 210.  
 Todd v. Botchford, 238.  
 Todd v. Gamble, 352.  
 Todd v. Western Union Tel. Co., 167, 169.

[The figures refer to pages]

- Tode v. Gross, 210.  
 Toledo, P. & W. R. Co. v. Johnston, 256.  
 Toledo, P. & W. R. Co. v. Patterson, 341.  
 Toledo, W. & W. R. Co. v. Beals, 347.  
 Toledo, W. & W. R. Co. v. McDonough, 156.  
 Toledo, W. & W. R. Co. v. Roberts, 312.  
 Toll v. Hiller, 264.  
 Tomlinson v. Derby, 335.  
 Tomlinson v. Wilmington & S. R. Co., 314, 384.  
 Tone v. Wilson, 513.  
 Tooker v. Brooklyn Heights R. Co., 346.  
 Tootle v. Clifton, 502.  
 Torp v. Gulseth, 192.  
 Torry v. Black, 183, 188.  
 Totten v. Pennsylvania R. Co., 137.  
 Towaliga Falls Power Co. v. Sims, 60.  
 Towles v. Atlantic Coast Line R. Co., 81, 85.  
 Town of Fowler v. Linquist, 343.  
 Town of Genoa v. Woodruff, 265.  
 Town of Nappanee v. Ruckman, 150.  
 Town of Royalton v. Royalton & W. Turnpike Co., 117.  
 Town of Troy v. Cheshire R. Co., 122, 125.  
 Town of Wheatlands v. Taylor, 220.  
 Townsend v. Briggs, 152, 343.  
 Townsend v. Hughes, 342.  
 Townsend v. Nickerson Wharf Co., 81, 109.  
 Townsend v. Texas & N. O. R. Co., 328.  
 Tracy v. Gunn, 511.  
 Tracy v. Hacket, 322.  
 Tracy v. Swartwout, 315.  
 Trafford v. Adams Exp. Co., 437.  
 Trammell v. Vaughan, 530.  
 Trapnall v. McAfee, 135.  
 Trauerman v. Lippincott, 504.  
 Traver v. Eighth Ave. R. Co., 130.  
 Travers v. Kansas Pac. R. Co., 326.  
 Travis v. Duffau, 55.  
 Traywick v. Southern R. Co., 376.  
 Trent & Humber Co., in re, 81.  
 Treschman v. Treschman, 139.  
 Trigg v. Clay, 274, 359.  
 Trigg v. St. Louis, K. C. & N. R. Co., 155, 163, 382.  
 Trimble v. Spiller, 154.  
 Trinity Church v. Higgins, 519.  
 Trinity Val. R. Co. v. Stewart, 486.  
 Trinity & S. R. Co. v. Schofield, 131.  
 Tripp v. Grouner, 313.  
 Trout v. Kennedy, 273, 275.  
 Trout v. Watkins Livery & Undertaking Co., 318.  
 Trow v. Thomas, 439.  
 Trowbridge v. Holcomb, 300.  
 Trower v. Elder, 217.  
 True v. International Tel. Co., 81, 393.  
 True & True Co. v. Woda, 482.  
 Trull v. Granger, 510, 520.  
 Truman v. Railroad Co., 17.  
 Trustees of Augusta v. Perkins, 497.  
 Trustees of Howard College v. Turner, 118.  
 Tubbs v. Van Kleek, 524.  
 Tucker v. Grover, 248.  
 Tucker v. Hyatt, 347.  
 Tucker v. Newman, 507.  
 Tucker v. Parks, 331.  
 Tucker v. Wright, 184.  
 Tufts v. Adams, 519.  
 Tufts v. Bennett, 351.  
 Tuller v. Carter, 253.  
 Tullidge v. Wade, 302.  
 Tully v. Fitchburg R. Co., 31.  
 Tunbridge Wells Dipper's Case, 35.  
 Tunncliffe v. Bay Cities Consol. R. Co., 158.  
 Turner v. Dawson, 229.  
 Turner v. Great Northern R. Co., 40, 139, 163, 380.  
 Turner v. Hadden, 118.  
 Turner v. Hearst, 179.  
 Turner v. Miller, 514, 516.  
 Turner v. Norfolk & W. R. Co., 432.  
 Turner v. North Beach & M. R. Co., 327.  
 Turner v. Smith, 499.  
 Turner's Case, 17.  
 Turrell v. Jackson, 192.  
 Turton v. New York Recorder Co., 179.  
 Tuteur v. Chicago & N. W. R. Co., 474.  
 Tutwiler Coal, Coke & Iron Co. v. Enslen, 472.  
 Tyler v. Bowen, 320.  
 Tyler v. Pomeroy, 150, 170.  
 Tyler v. Safford, 135.  
 Tyler v. Salley, 521, 524, 525.  
 Tyler v. Western Union Tel. Co., 166, 388, 398, 408.  
 Tyner v. Hays, 329, 330.  
 Tyng v. Commercial Warehouse Co., 281.  
 Tyson v. Ewing, 313, 322.

[The figures refer to pages]

U

Ulbricht v. Eufaula Water Co., 32.  
 Ullne v. New York Cent. & H. R.  
 Co., 120, 122, 123, 127.  
 Underwood v. Wolf, 364.  
 Union Pac. R. Co. v. Dunden, 456,  
 458.  
 Union Pac. R. Co. v. Hause, 309.  
 Union Pac. R. Co. v. Jones, 138.  
 Union Pac. R. Co. v. Shook, 338.  
 Union Sav. Inst. v. Boston, 280.  
 Union Traction Co. of Indiana v.  
 Sullivan, 338.  
 Union Trust Co. of New York v.  
 Cuppy, 120.  
 Union Water Power Co. v. Inhab-  
 itants of Lewiston, 252.  
 United Engineering & Contracting  
 Co. v. Broadnax, 353.  
 United Shoe Mach. Co. v. Abbott,  
 206.  
 U. S. v. Alden, 17.  
 U. S. v. Bayard, 237.  
 U. S. v. Behan, 131.  
 U. S. v. Magoon, 501.  
 U. S. v. North Bloomfield Gravel  
 Min. Co., 17.  
 U. S. v. Taylor, 313, 314, 321, 504.  
 U. S. v. Verdier, 237.  
 United States Bank v. Chapin, 260.  
 United States Brewing Co. v. Stol-  
 tenberg, 451.  
 United States Electric Lighting Co.  
 v. Sullivan, 475.  
 United States Exp. Co. v. Haines,  
 375.  
 United States Exp. Co. v. Meints,  
 190.  
 United States Tel. Co. v. Gilder-  
 sleeve, 413, 416.  
 United States Tel. Co. v. Wenger,  
 394, 409.  
 United States Trust Co. v. O'Brien,  
 519, 520.  
 Upham v. Dickinson, 348.  
 Upjohn v. Board, 27.

V

Vallery v. State, 179.  
 Vallo v. United States Exp. Co., 19.  
 Valpy v. Oakeley, 357.  
 Van Alen v. Rogers, 494.  
 Van Aredale v. Rundel, 81.  
 Van Benschooten v. Lawson, 264.  
 Van Brocklen v. Smeallie, 355.  
 Van Brunt v. Cincinnati, J. & M.  
 R. Co., 488.

HALE DAM. (2D ED.)—38

Vandenburgh v. Truax, 47.  
 Vanderpool v. Richardson, 163, 520,  
 522, 528.  
 Vanderslice v. Philadelphia, 505.  
 Van Derveer v. Sutphin, 180.  
 Vandervoort v. Gould, 495.  
 Van Deusen v. Young, 508.  
 Vanduzor v. Linderman, 25.  
 Van Hoozier v. Hannibal & St. J.  
 R. Co., 120.  
 Van Husan v. Kanouse, 267, 296.  
 Van Norden v. Robinson, 27.  
 Van Orsdel v. Burlington, O. R.  
 & N. R. Co., 121.  
 Van Felt v. McGraw, 192.  
 Van Rensselaer v. Dole, 22.  
 Van Rensselaer v. Jewett, 246.  
 Van Rensselaer v. Jones, 246.  
 Van Rensselaer's Ex'rs v. Platner's  
 Ex'rs, 330.  
 Van Winkle v. Wilkins, 56.  
 Van Winter v. Henry Co., 348.  
 Van Wyck v. Allen, 111, 366.  
 Varco v. Chicago, M. & St. P. R.  
 Co., 255.  
 Varnham v. Council Bluffs, 187.  
 Vassau v. Madison Electric R. Co.,  
 328.  
 Vaughan v. Kennan, 267.  
 Vaughan's Seed Store v. Stringfel-  
 low, 67.  
 Vedder v. Delaney, 131.  
 Vedder v. Hildreth, 56.  
 Veiths v. Hagge, 229.  
 Velte v. U. S., 256.  
 Vera Cruz, The, 424.  
 Vermilya v. Chicago, M. & St. P.  
 R. Co., 502.  
 Vermont State Baptist Convention  
 v. Ladd, 235.  
 Verrill v. Minot, 138.  
 Vicars v. Wilcocks, 57, 61.  
 Vickery v. McCormick, 362.  
 Vicksburg & J. R. Co. v. Patton,  
 314, 326.  
 Vicksburg & M. R. Co. v. Ragsdale,  
 376, 377.  
 Victorian Ry.'s Com'rs v. Coultas,  
 143, 147, 381.  
 Village of Cartersville v. Cooke, 59.  
 Village of Sheridan v. Hibbard,  
 101, 170.  
 Vinal v. Core, 153.  
 Vlasservitch v. Augusta & A. R.  
 Co., 311.  
 Voltz v. Blackmar, 176, 302.  
 Von Hemert v. Porter, 265.  
 Von Storch v. Griffin, 529.  
 Vorse v. Phillips, 132, 135.  
 Vosburg v. Putney, 45, 66.



[The figures refer to pages]

Vosburgh v. Welch, 185.  
 Vossen v. Dautel, 19.  
 Vowell v. Issaquah Coal Co., 486.

## W

Wabash R. Co. v. Mathew, 47.  
 Wabash, St. L. & P. R. Co. v. Locke, 24, 46.  
 Wabash, St. L. & P. R. Co. v. Rector, 317, 326, 348.  
 Wabash Western R. Co. v. Friedman, 335, 343.  
 Wabash & W. R. Co. v. Morgan, 150.  
 Wade v. Herndi, 278.  
 Wade v. Leroy, 101.  
 Wadsworth v. Treat, 152.  
 Wadsworth v. Western Union Tel. Co., 141, 142, 144, 161, 162, 165.  
 Waggoner v. Cox, 205.  
 Waggoner v. Snody, 190, 193.  
 Wagner v. Gibbs, 319.  
 Wagner v. Peterson, 292.  
 Wainwright v. Satterfield, 347.  
 Wainwright v. Weske, 330.  
 Wakefield v. Beckley, 220.  
 Wakeman v. Wheeler & W. Mfg. Co., 106, 111.  
 Wald v. Pittsburgh, C., C. & St. L. R. Co., 63.  
 Waldele v. New York Cent. & H. R. R. Co., 476.  
 Walden v. Western Union Tel. Co., 395.  
 Waldo v. Goodsell, 437.  
 Waldron v. Willard, 3.  
 Wales v. Pacific Electric Motor Co., 431.  
 Walker v. Borland, 295.  
 Walker v. Cruikshank, 25.  
 Walker v. Engler, 213, 214.  
 Walker v. Erie R. Co., 102, 345.  
 Walker v. France, 510.  
 Walker v. Fuller, 313.  
 Walker v. Johnson, 528.  
 Walker v. Lake Shore & M. S. R. Co., 426.  
 Walker v. McNeill, 433, 443, 487.  
 Walker v. Smith, 338.  
 Wall v. City of London Real Property Co., 5.  
 Wall v. Platt, 277, 278.  
 Wallace v. Berdell, 495.  
 Wallace v. Goodall, 500.  
 Wallace v. Western N. O. R. Co., 170, 171.  
 Wallace v. York, 135.  
 Waller v. Kingston Coal Co., 224.  
 Waller v. Long, 206.  
 Waller v. Waller, 313.  
 Walrath v. Redfield, 251.  
 Walser v. Western Union Tel. Co., 397, 400.  
 Walsh v. Chicago, M. & St. P. R. Co., 140, 163, 170, 380.  
 Walter v. Post, 189.  
 Walters v. Chamberlin, 503.  
 Walters v. Chicago, R. I. & P. R. Co., 462, 478.  
 Walton v. Meeks, 511.  
 Walton v. U. S., 237.  
 Walton v. Walton, 331.  
 Walworth v. Pool, 93.  
 Wanamaker v. Bowes, 313.  
 Wappoo Mills v. Commercial Guano Co., 79.  
 Ward v. Ashbrook, 519.  
 Ward v. Blackwood, 152, 176, 315.  
 Ward v. Blake Mfg. Co., 181.  
 Ward v. Dampskibsselskabet Kjobenhavn, 441.  
 Ward v. Dean, 153, 181.  
 Ward v. Hudson River Bldg. Co., 212.  
 Ward v. Jewett, 221.  
 Ward v. Maine Cent. R. Co., 486.  
 Ward v. New York Cent. R. Co., 74, 375.  
 Ward v. Smith, 109, 259, 337.  
 Ward v. Thompson, 155.  
 Ward v. West Jersey & S. R. Co., 11, 148.  
 Ward's Cent. & P. Lake Co. v. Elkins, 91, 370.  
 Wardrobe v. California Stage Co., 324.  
 Ware v. Simmons, 238.  
 Warner v. Bacon, 117.  
 Warner v. Chamberlain, 151.  
 Warner v. Juif, 260.  
 Warner v. Press Pub. Co., 153, 172.  
 Warre v. Calvert, 32.  
 Warren v. Boston & M. R. R., 146, 150.  
 Warren v. Cole, 133, 337, 340.  
 Warren v. Franklin Ins. Co., 298.  
 Warren v. Stoddart, 88, 92.  
 Wartman v. Swindell, 33.  
 Warwick v. Hutchinson, 64.  
 Washington & G. R. Co. v. American Car Co., 110.  
 Washington & G. R. Co. v. Hickey, 234.  
 Waters v. Greenleaf-Johnson Lumber Co., 5.  
 Waters v. Towers, 56.  
 Watkin v. Hall, 181.  
 Watkins v. Kaolin Mfg. Co., 147.  
 Watkins v. Morgan, 227.  
 Watkins v. Rist, 88, 93.  
 Watkinson v. Laughton, 229, 372.  
 Watriss v. First Nat. Bank, 520.

[The figures refer to pages]

- Watson v. Ambergate, N. & B. R. Co., 104.  
 Watson v. Christie, 176.  
 Watson v. Dilts, 147, 148.  
 Watson v. Fuller, 238.  
 Watson v. Harmon, 340, 346.  
 Watson v. Loughran, 283.  
 Watson v. Needham, 360.  
 Watson v. New Millford, 131.  
 Watson v. Rinderknecht, 45, 188.  
 Watson v. Seaboard A. L. R. Co., 442.  
 Watt v. Hoch, 229.  
 Watt v. Nevada Cent. R. Co., 273.  
 Watt v. Potter, 281.  
 Watt's Ex'rs v. Sheppard, 219, 220.  
 Watterson v. Allegheny Val. R. Co., 111.  
 Watts v. Camors, 218.  
 Watts v. Sheppard, 216.  
 Watts v. Watts, 262.  
 Weaver v. Bachert, 524.  
 Weaver v. Page, 342.  
 Weaver v. Penny, 65.  
 Webb v. Denver & R. G. W. R. Co., 430, 469.  
 Webb v. Gilman, 313, 317, 319.  
 Webb v. Gross, 32.  
 Webb v. Halt, 514.  
 Webb v. Phillips, 253.  
 Webb v. Portland Mfg. Co., 9, 10, 13, 15, 21, 30, 32, 35.  
 Weber v. Anderson, 513.  
 Weber v. International R. Co., 138.  
 Weber v. Morris & E. R. Co., 187.  
 Webster v. Moe, 501.  
 Weeks v. Little, 212.  
 Weeks v. Prescott, 61.  
 Wegner v. Second Ward Sav. Bank, 231, 275.  
 Wehle v. Butler, 230, 253.  
 Wehle v. Haviland, 112, 275, 295.  
 Weir v. Allegheny Co., 233.  
 Welborn v. Dixon, 318.  
 Welch v. Anderson, 79.  
 Welch v. Durand, 132.  
 Welch v. Jugenheimer, 154.  
 Welch v. McDonald, 212.  
 Welch v. Maine Cent. R. Co., 486.  
 Welch v. Northeastern R. Co., 132, 134.  
 Welch v. Ware, 100, 102, 341.  
 Weld v. Reilly, 184.  
 Weller v. Baker, 35.  
 Weller v. Chicago, M. & St. P. R. Co., 486.  
 Wells v. Abernathy, 509.  
 Wells v. Boston & M. R. R., 53, 55.  
 Wells v. Denver & R. G. W. R. Co., 430, 442.  
 Wells v. New Haven & Northampton Co., 122, 127.  
 Wells v. Padgett, 521, 523, 524.  
 Wells v. Watling, 30.  
 Wells, Fargo & Co.'s Express v. Fuller, 161, 162, 163.  
 Welsh v. Cheek, 25.  
 Welsh v. First Division of St. Paul & P. R. Co., 285.  
 Wemple v. Stewart, 272.  
 Wentworth v. Dows, 365.  
 Wernwag v. Mothershead, 262.  
 Wesson v. Washburn Iron Co., 507.  
 West v. Forrest, 152, 170.  
 West v. Wentworth, 288.  
 West v. Western Union Tel. Co., 166, 419, 420.  
 West Chicago St. R. Co. v. Foster, 436.  
 West Chicago St. R. Co. v. Levy, 333.  
 West Coast Mfg. & Inv. Co. v. West Coast Imp. Co., 515.  
 Westcott v. Central Vt. R. Co., 491.  
 Westcott v. Middleton, 41, 140.  
 Western Mfg. Co. v. Guiding Star, The, 373.  
 Western Real Estate Trustees v. Hughes, 96.  
 Western Ry. of Alabama v. Mutch, 51, 57, 58.  
 Western Union Tel. Co. v. Adams, 168.  
 Western Union Tel. Co. v. Andrews, 162.  
 Western Union Tel. Co. v. Archie, 169.  
 Western Union Tel. Co. v. Beals, 397.  
 Western Union Tel. Co. v. Benson, 419.  
 Western Union Tel. Co. v. Berdine, 172.  
 Western Union Tel. Co. v. Blanchard, 408.  
 Western Union Tel. Co. v. Blockmer, 165, 167, 168.  
 Western Union Tel. Co. v. Broesche, 164.  
 Western Union Tel. Co. v. Brown, 168, 393.  
 Western Union Tel. Co. v. Butler, 167, 168.  
 Western Union Tel. Co. v. Carew, 388.  
 Western Union Tel. Co. v. Carter, 162, 168, 406.  
 Western Union Tel. Co. v. Clifton, 402.  
 Western Union Tel. Co. v. Cline, 166.

## CASES CITED

[The figures refer to pages]

- Western Union Tel. Co. v. Coffin, 168, 404.  
 Western Union Tel. Co. v. Coggin, 167.  
 Western Union Tel. Co. v. Collins, 390.  
 Western Union Tel. Co. v. Cooper, 158, 171, 400.  
 Western Union Tel. Co. v. Cornwell, 406, 416.  
 Western Union Tel. Co. v. Crall, 104, 400, 401.  
 Western Union Tel. Co. v. Crawford, 398.  
 Western Union Tel. Co. v. Cross' Adm'rs, 419.  
 Western Union Tel. Co. v. Cunningham, 165.  
 Western Union Tel. Co. v. De Audrea, 165.  
 Western Union Tel. Co. v. Dickens, 504.  
 Western Union Tel. Co. v. Edsall, 416.  
 Western Union Tel. Co. v. Eubanks, 387, 388, 402.  
 Western Union Tel. Co. v. Eyser, 314, 328.  
 Western Union Tel. Co. v. Fatman, 414.  
 Western Union Tel. Co. v. Feegles, 168.  
 Western Union Tel. Co. v. Fellner, 394, 401.  
 Western Union Tel. Co. v. Ferguson, 141, 166.  
 Western Union Tel. Co. v. Frith, 419.  
 Western Union Tel. Co. v. Graham, 404.  
 Western Union Tel. Co. v. Griswold, 408.  
 Western Union Tel. Co. v. Haley, 389.  
 Western Union Tel. Co. v. Hall, 65, 100, 104, 108, 393, 395, 400, 401, 414.  
 Western Union Tel. Co. v. Haman, 393.  
 Western Union Tel. Co. v. Hawkins, 164.  
 Western Union Tel. Co. v. Hearne, 418.  
 Western Union Tel. Co. v. Henderson, 144, 165.  
 Western Union Tel. Co. v. Henley, 391, 408.  
 Western Union Tel. Co. v. Hill, 165.  
 Western Union Tel. Co. v. Hogue, 404.  
 Western Union Tel. Co. v. Hollingsworth, 166.  
 Western Union Tel. Co. v. Hopkins, 330.  
 Western Union Tel. Co. v. Hawle, 169.  
 Western Union Tel. Co. v. Hyer Bros., 412, 414.  
 Western Union Tel. Co. v. Jackson, 165.  
 Western Union Tel. Co. v. J. A. Kemp Grocer Co., 406.  
 Western Union Tel. Co. v. James, 393.  
 Western Union Tel. Co. v. Jeanes, 417.  
 Western Union Tel. Co. v. Jobe, 410.  
 Western Union Tel. Co. v. Kendzora, 400.  
 Western Union Tel. Co. v. Kirkpatrick, 168.  
 Western Union Tel. Co. v. Landis, 398.  
 Western Union Tel. Co. v. Lawson, 388, 419.  
 Western Union Tel. Co. v. Lehman & Bro., 401.  
 Western Union Tel. Co. v. Linn, 162, 164, 167, 168.  
 Western Union Tel. Co. v. Long, 165.  
 Western Union Tel. Co. v. Longwill, 396.  
 Western Union Tel. Co. v. Lowrey, 410.  
 Western Union Tel. Co. v. Luck, 168.  
 Western Union Tel. Co. v. McKibben, 396.  
 Western Union Tel. Co. v. McMorris, 144, 165, 168.  
 Western Union Tel. Co. v. Martin, 413.  
 Western Union Tel. Co. v. May, 164.  
 Western Union Tel. Co. v. Mellon, 387.  
 Western Union Tel. Co. v. Mellor & Barnes, 411.  
 Western Union Tel. Co. v. Milton, 397, 408.  
 Western Union Tel. Co. v. Moore, 168.  
 Western Union Tel. Co. v. Motley, 162.  
 Western Union Tel. Co. v. Nagle, 416.  
 Western Union Tel. Co. v. Nations, 164.  
 Western Union Tel. Co. v. Northcutt, 161, 165.

[The figures refer to pages]

- Western Union Tel. Co. v. Oastler, 169.  
 Western Union Tel. Co. v. Olivari, 165, 167, 168.  
 Western Union Tel. Co. v. Parlin & Orendorff Co., 406.  
 Western Union Tel. Co. v. Parsley, 165.  
 Western Union Tel. Co. v. Pratt, 416.  
 Western Union Tel. Co. v. Prevatt, 168.  
 Western Union Tel. Co. v. Proctor, 161, 164.  
 Western Union Tel. Co. v. Reynolds, 414.  
 Western Union Tel. Co. v. Robinson, 396.  
 Western Union Tel. Co. v. Rogers, 155, 166, 391.  
 Western Union Tel. Co. v. Rosentreter, 164.  
 Western Union Tel. Co. v. Schriver, 388.  
 Western Union Tel. Co. v. Sheffield, 397, 409.  
 Western Union Tel. Co. v. Shenep, 169.  
 Western Union Tel. Co. v. Short, 407.  
 Western Union Tel. Co. v. Simpson, 161, 167, 169, 173.  
 Western Union Tel. Co. v. Smith, 407.  
 Western Union Tel. Co. v. Spivey, 398.  
 Western Union Tel. Co. v. Stephens, 162.  
 Western Union Tel. Co. v. Stone, 162.  
 Western Union Tel. Co. v. Truitt, 417.  
 Western Union Tel. Co. v. Twaddell, 77, 83, 400, 404.  
 Western Union Tel. Co. v. Valentine, 396.  
 Western Union Tel. Co. v. Van Cleave, 388.  
 Western Union Tel. Co. v. Ward, 168.  
 Western Union Tel. Co. v. Watson, 400.  
 Western Union Tel. Co. v. Way, 412, 414.  
 Western Union Tel. Co. v. Wells, 403.  
 Western Union Tel. Co. v. Westmoreland, 169, 419.  
 Western Union Tel. Co. v. Williford, 408.  
 Western Union Tel. Co. v. Wilson, 80, 414, 415.  
 Western Union Tel. Co. v. Wingate, 162.  
 Western Union Tel. Co. v. Wood, 166.  
 Western & A. R. Co. v. Hyer, 486.  
 Western & A. R. Co. v. McCauley, 255.  
 Western & A. R. Co. v. Meigs, 480.  
 Western & A. R. Co. v. Young, 151, 234, 250, 252.  
 Westfield v. Westfield, 261.  
 Weston v. Grand Trunk R. Co., 375.  
 Wetzel v. Richcreek, 519.  
 W. F. Vandiver & Co. v. Waller, 53, 320.  
 Whalley v. Pepper, 25.  
 Wheatley v. Thorn, 323.  
 Wheaton v. Pike, 266, 267.  
 Wheelan v. Chicago, M. & St. P. R. Co., 478.  
 Wheeler v. Hanson, 153.  
 Wheeler v. Newberry, 237.  
 Wheeler v. Pereles, 191.  
 Wheeler v. Randall, 55.  
 Wheeler & Wilson Mfg. Co. v. Boyce, 326.  
 Wheeler & Wilson Mfg. Co. v. Thompson, 366.  
 Wheelock v. Postal Tel. Cable Co., 411.  
 Wheelock v. Wheelwright, 186.  
 Wheelwright v. Beers, 371.  
 Whipple v. Cumberland Mfg. Co., 21, 132, 345.  
 Whipple v. Wanskuck Co., 508.  
 White v. Ballou, 66.  
 White v. Cannada, 329.  
 White v. Clack, 497.  
 White v. Dresser, 145, 158, 159.  
 White v. Iltis, 262.  
 White v. Lyons, 231.  
 White v. Miller, 101, 111, 248, 366.  
 White v. Moseley, 503.  
 White v. Northwest Stage Co., 331.  
 White v. Salisbury, 296.  
 White v. Sander, 143, 148.  
 White v. Solomon, 354.  
 White v. Stoner, 508.  
 White v. Webb, 192.  
 White v. Yawkey, 283, 501.  
 Whitehall Transp. Co. v. New Jersey Steam Boat Co., 251.  
 Whitehead v. Brothers Lodge I. O. O. F., 219.  
 Whitehead v. Kennedy, 348.  
 Whitehouse v. Fellowes, 126.  
 Whiteley v. Mississippi Water Power & Boom Co., 187.  
 White River L. & W. R. Co. v. Star Ranch & Land Co., 137.  
 Whiterow v. Briggs, 262.

[The figures refer to pages]

- White Sewing Mach. Co. v. Dakin, 195.  
 White Sewing-Mach. Co. v. Richter, 47.  
 Whiteside v. Jennings, 509, 510.  
 Whiteside v. Magruder, 517.  
 Whitfield v. Westbrook, 315.  
 Whitfield v. Whitfield, 290, 294, 321.  
 Whitford v. Panama R. Co., 424, 436.  
 Whitham v. Kershaw, 5.  
 Whitman v. Leslie, 344.  
 Whitmarsh v. Littlefield, 94.  
 Whitmore v. Bischoff, 120.  
 Whitney v. Allaire, 3, 32.  
 Whitney v. Chicago, & N. W. R. Co., 254, 371.  
 Whitney v. Hitchcock, 154, 322.  
 Whitney v. State, 237.  
 Whitney v. Thatcher, 298.  
 Whiton v. Chicago & N. W. R. Co., 429, 449, 450.  
 Whitson v. Gray, 112.  
 Whittmore v. Cutter, 30, 133.  
 Whitten v. Fuller, 184.  
 Whitworth v. Hart, 235.  
 Wibaux v. Grinnell Live Stock Co., 219.  
 Wichita & W. R. Co. v. Beebe, 113.  
 Wiest v. Electric Traction Co., 472.  
 Wiggin v. Coffin, 303, 345.  
 Wiggins v. Pender, 514.  
 Wiggins Ferry Co. v. Chicago & A. R. Co., 247.  
 Wilbur v. Johnson, 162, 521, 523.  
 Wilcox v. Campbell, 98.  
 Wilcox v. Richmond & D. R. Co., 139, 160.  
 Wilcox v. Wilmington City R. Co., 439.  
 Wilcus v. Kling, 211, 212.  
 Wilds v. Bogan, 162, 524.  
 Wiley v. Keokuk, 177.  
 Wiley v. West Jersey R. Co., 64.  
 Wilkins v. Wainwright, 311.  
 Wilkinson v. Colley, 211.  
 Wilkinson v. Davies, 47.  
 Wilkinson v. Drew, 314, 334.  
 Wilkinson v. Dunbar, 105.  
 Wilkinson v. Ferree, 368.  
 Wilkinson v. Searcy, 315.  
 Willard v. Holmes, Booth & Haydens, 342.  
 Willer v. Oregon Ry. & Nav. Co., 107.  
 Willey v. Fredericks, 98.  
 Williams v. American Bank, 224.  
 Williams v. Bank of Illinois, 236.  
 Williams v. Burg, 514.  
 Williams v. Camden & R. Water Co., 120.  
 Williams v. Chicago Coal Co., 94.  
 Williams v. Consequa, 230.  
 Williams v. Crum, 282.  
 Williams v. Dakin, 211.  
 Williams v. Ealing, 38.  
 Williams v. Hollingsworth, 527.  
 Williams v. Jones, 299, 352.  
 Williams v. Mostyn, 33, 38.  
 Williams v. Reynolds, 361.  
 Williams v. Sims, 299.  
 Williams v. Vanderbilt, 47, 379, 381.  
 Williams v. West Bay City, 131.  
 Williams v. Williams, 322.  
 Williams' Case, 23.  
 Williamson v. Broughton, 239.  
 Williamson v. Central of Georgia R. Co., 12, 143, 147.  
 Williar v. Baltimore Butchers' Loan & Annuity Ass'n of Baltimore City, 2.  
 Williard v. Holmes, Booth & Haydens, 153.  
 Willingham v. Hooven, 109.  
 Willings v. Consequa, 257.  
 Willis v. Branch, 107.  
 Willis v. McKinnou, 494.  
 Willis v. McNeill, 349.  
 Willis v. McNott, 253.  
 Willis v. Perry, 27.  
 Willoughby v. Backhouse, 3.  
 Wills v. Allison, 293.  
 Wilsey v. Louisville & N. R. Co., 157.  
 Wilson v. Baltimore, 196.  
 Wilson v. Bowen, 307.  
 Wilson v. Central of Georgia R. Co., 67.  
 Wilson v. Cobb, 231.  
 Wilson v. Dean, 206.  
 Wilson v. Dock Co., 73, 74.  
 Wilson v. Dunville, 47.  
 Wilson v. George, 300.  
 Wilson v. Godkin, 208, 217.  
 Wilson v. Goit, 153.  
 Wilson v. Mathews, 288.  
 Wilson v. Middleton, 323.  
 Wilson v. Newport Dock Co., 55, 90.  
 Wilson v. Northern Pac. R. Co., 157.  
 Wilson v. Railroad Co., 48, 74, 374, 377.  
 Wilson v. Reedy, 368.  
 Wilson v. The Mary, 17.  
 Wilson v. Troy, 255.  
 Wilson v. Vaughn, 311, 314.  
 Wilete v. Tilden, 475.  
 Winch v. Mutual Ben. Ice. Co., 236.  
 Winchester v. Craig, 253, 501.  
 Winchester v. Stevens Point, 120.

[The figures refer to pages]

- Winkler v. Roeder, 182.  
Winkler v. St. Louis, I. M. & S. R. Co., 66.  
Winn v. Jeckham, 815, 819.  
Winne v. Kelley, 81.  
Winnt v. International & G. N. R. Co., 464.  
Winside State Bank v. Lound, 357.  
Winslow Elevator & Machine Co. v. Hoffman, 75, 77, 83.  
Winslow v. Lane, 111.  
Winslow v. McCall, 518.  
Winslow v. Stokes, 113, 114.  
Winstead v. Hulme, 132, 309.  
Winston Elevator & Mach. Co. v. Hoffman, 75.  
Winter v. Peterson, 7, 321.  
Winterbottom v. Derby, 23.  
Winterbottom v. Wright, 32.  
Winterburn v. Brooks, 18.  
Wintermute v. Cooke, 276.  
Wintz v. Morrison, 56.  
Wire v. Foster, 357.  
Wirsing v. Smith, 324.  
Wisdom v. Reeves, 496.  
Wise v. Teerpenning, 433.  
Witherbee v. Meyer, 110.  
Withers v. Greene, 364, 365.  
Withers v. Henley, 119.  
Withers v. Reynolds, 117.  
Wittenberg v. Mollyneaux, 247.  
Wittich v. O'Neal, 135.  
Wohlberg v. Melchert, 343.  
Wolcott v. Mount, 81, 99, 111, 366.  
Wolf v. Studebaker, 94.  
Wolf v. St. Louis Independent Water Co., 98.  
Wolf v. Trinkle, 145, 152, 155, 172.  
Wolfe v. Railroad Co., 452.  
Wolff v. Cohen, 323.  
Wolford v. Lyon Gravel Min. Co., 488.  
Womack v. Fudikar, 25.  
Wood v. American Nat. Bank, 312.  
Wood v. Bullens, 296.  
Wood v. Pennsylvania R. Co., 54, 55.  
Wood v. Robbins, 228.  
Wood v. Waud, 33.  
Woodbury v. Turner, Day & Woolworth Mfg. Co., 210.  
Woodger v. Railway Co., 375.  
Woodhouse v. Powles, 310.  
Woodhull v. Rosenthal, 494, 496.  
Woodhull v. Wagner, 299.  
Woodin v. Wentworth, 109.  
Woodman v. Nottingham, 4.  
Woodmansie v. Logan, 25.  
Woodruff v. Cook, 331, 336.  
Woodruff v. Webb, 259.  
Woods v. McCall, 184.  
Woodward v. Glidden, 177.  
Woodward v. Illinois Cent. R. Co., 254.  
Woodward v. Ragland, 325.  
Woodward v. Woodward, 231.  
Woodworth v. Gorsline, 253.  
Worden v. Humeston & S. R. Co., 476.  
Work v. Bennett, 292.  
Work v. Glaskins, 258.  
World's Columbian Exposition v. Pasteur-Chamberland Filter Co., 274.  
Wormouth v. Cramer, 22.  
Worrall v. Munn, 508.  
Worrell v. McClinagham, 212.  
Worster v. Proprietors of Canal Bridge Co., 344.  
Wragg & Son Co. v. Mead, 71.  
Wright v. Bank of the Metropolis, 286, 290.  
Wright v. Beardsley, 161, 163.  
Wright v. Compton, 335.  
Wright v. Davenport, 365.  
Wright v. Donnell, 311.  
Wright v. Mulvaney, 107, 112.  
Wright v. Nipple, 518.  
Wright v. Wright, 118.  
Wrynn v. Downey, 524.  
Wulstein v. Mohlman, 57, 68, 159.  
Wunderlich v. New York, 342.  
Wylie v. Birch, 33.  
Wyman v. Leavitt, 141, 142, 145.  
Wyman v. Robinson, 195.  
Wynne v. Atlantic Ave. R. Co., 107, 130.  
Wynne v. Parsons, 21, 184, 309.
- Y
- Yale v. Saunders, 185.  
Yaple v. New York, O. & W. R. Co., 115.  
Yater v. Mullen, 231.  
Yates v. Joyce, 1.  
Yates v. New York Cent. & H. R. Co., 314, 382, 384.  
Yates v. Whyte, 187.  
Yazoo & M. V. R. Co. v. Millsaps, 62.  
Yazoo & M. V. R. Co. v. Mitchell, 317.  
Yeager v. Weaver, 510.  
Yeates v. Reed, 22.  
Yeaton v. Boston & M. R. R., 437.  
Yellowly v. Pitt County Com'rs, 237.  
Yellow Pine Lumber Co. v. Carroll, 236.  
Yellow Poplar Lumber Co. v. Chapman, 352.  
Yelton v. Slinkard, 254.  
Yenner v. Hammond, 210.

## CASES CITED

[The figures refer to pages]

- |   |  |
|---|--|
| <p> Yerian v. Linkletter, 314.<br/> Yetter v. Hudson, 197, 206.<br/> Yoakum v. Dunn, 139.<br/> Yoakum v. Kroeger, 12, 147.<br/> Yokom v. McBride, 511.<br/> Yorton v. Milwaukee L. S. &amp; W.<br/> R. Co., 99, 382, 383.<br/> Yorton v. Railway Co., 379.<br/> Young v. Courtney, 133.<br/> Young v. Cureton, 112.<br/> Young v. Godbe, 227.<br/> Young v. Gormley, 177, 303.<br/> Young v. Hill, 264, 267.<br/> Young v. Johnson, 182.<br/> Young v. Mertens, 355.<br/> Young v. Polack, 227.<br/> Young v. Spencer, 38.<br/> Young v. Thompson, 261.<br/> Young v. Western Union Tel. Co.,<br/> 142, 165. </p> | <p> Young v. White, 213.<br/> Yount v. Carney, 153. </p> <p style="text-align: center;"><b>Z</b></p> <p> Zabriskie v. Central Vt. R. Co.,<br/> 365.<br/> Zabriskie v. Smith, 3, 193.<br/> Ziegler v. Wells, Fargo &amp; Co., 276.<br/> Zeliff v. Jennings, 153.<br/> Zemindar Case, 16.<br/> Zenobia, The, 381.<br/> Ziebarth v. Nye, 121, 124, 503.<br/> Ziegler v. Powell, 136, 323.<br/> Zimmerman v. Conrad, 208.<br/> Zogbaum v. Parker, 3.<br/> Zonker v. People's Union Mercan-<br/> tile Co., 336.<br/> Zurawski v. Reichmann, 178. </p> |
|---|--|

# INDEX

[THE FIGURES REFER TO PAGES]

## A

- ABDUCTION,**
    - Of children, damages for mental suffering, 154.
  - ABUSE OF PROCESS,**
    - Exemplary damages, 320.
  - AD DAMNUM,**
    - Definition and nature, 329.
  - ADMINISTRATOR,**
    - Nominal damages for failure to settle accounts, 32 (note).
  - ADMIRALTY,**
    - Counsel fees in, not allowed as damages, 133 (note).
  - ADVERTISEMENT,**
    - Damages for negligent omission of, 106.
  - AGENT,**
    - Liability of principal for exemplary damages for act of, 324.
  - AGGRAVATION AND MITIGATION,**
    - See "Exemplary Damages."
    - Definition of terms, 173.
    - Province of court and jury, 174.
    - The question only as to the admissibility and effect of evidence, 175.
    - Assault and battery, 176.
    - False imprisonment, 177.
    - Libel and slander, 178.
      - Provocation, 178.
      - Common-law retraction, 179.
      - Honest belief, rumors, 179.
      - Plaintiff's character and position, 181.
    - Of exemplary damages, 315.
    - Breach of marriage promise, circumstances of aggravation, 524.
    - Circumstances in mitigation, 527.
  - ALIENATION OF AFFECTIONS,**
    - Damages for mental suffering of wife, 154.
- HALE DAM. (2D ED.) (601)



[The figures refer to pages]

**ALTERNATIVE CONTRACTS,**

Defined, 220.

Damages for breach, 220.

**APPEAL,**

Interest as damages for vexatious appeal, 239 (note).

**ASSAULT AND BATTERY,**

Damages for mental suffering, 154, 155.

Aggravation and mitigation of damages, 176.

Exemplary damages, 319.

**ATTACHMENT,**

Mental suffering as element of damages for vexatious attachment, 160.

**AUTHORIZED CONDUCT,**

Damage incident to, 15.

Damages for permanent structure, 122.

**AVOIDABLE CONSEQUENCES,**

Not a proximate result of a wrong, 60.

Reasonable expenses recoverable, 90.

The rule applied, illustrations, 91.

Limitations of rule, 96.

Rule of contributory negligence distinguished, 96.

Carrier's refusal to transport, duty to seek other mode of conveyance, 370.

Duty of passenger to pay fare to avoid ejection, 383.

In actions against telegraph companies, 416.

Trespass to real property, 503.

**B****BENEFITS,**

Reduction of loss by benefits, 187.

**BILLS AND NOTES,**

Value, 275 (note).

**BONDS**

Damages on penal bonds, 194.

Damages cannot be greater than penalty, 195.

Damages less than penalty, 195.

Value, 275.

Exemplary damages in action on statutory bond, 310.

**BREACH OF PROMISE OF MARRIAGE,**

Liquidated damages for, 210.

Compensatory damages, 522.

Pecuniary losses, 522.

Nonpecuniary losses, 523.

Mental suffering as element of damages, 162.

[The figures refer to pages]

**BREACH OF PROMISE OF MARRIAGE—(Cont'd)**

- Circumstances of aggravation, 524.
- Circumstances in mitigation, 527.
- Exemplary damages, 310, 529.

**C**

**CARRIERS,**

- Breach of contract, mental suffering as element of damages, 163.
- Damages in actions against, 369.
- Carriers of goods, damages for refusal to transport, 369.
  - Avoidable consequences, 370.
  - Damages for loss or nondelivery, 48, 371.
  - Proximate and remote causes of loss, 62.
  - Damages for injury in transit, 373.
  - Damages for delay, 374.
  - Consequential damages, 376.
  - Illustrations, 377.
- Damages for injury to passenger, 378.
  - Damages for mental suffering of passenger, 380.
  - Exemplary damages for injury to passenger, 380.
  - Personal injury to passenger, 380.
  - Failure to carry passenger, 381.
    - Delay, 381.
    - Wrongful ejection, 381.
    - Mental suffering, 156.
  - Duty of passenger to pay fare to avoid ejection, 383.

**CAUSE,**

- See "Proximate and Remote Cause."

**CERTAINTY,**

- The required certainty of damages, 99.
- Amount of damage must be shown, 99.
- Profits or gains prevented, 103.
- Illustrations, 107.
- Liquidated damages where damages are uncertain, 209.
- Of damages in actions against telegraph companies, 392.
- Remote and speculative damages in actions against telegraph companies, 399.

**CIPHER MESSAGES.**

- Consequential damages for delay, 80.
- Damages for nondelivery, 411.
- Abbreviations, 416.

**CIVIL DAMAGE LAWS,**

- Liability for death of person engaged in violating law, 59.
- Damages for mental suffering, 154.

**COMPENSATION,**

- See "Compensatory Damages"; "Value."
- For nonpayment of money, see "Interest."

[The figures refer to pages]

**COMPENSATION—(Cont'd)**

- The theory of damages, 4.
  - Not restitution, the measure of damages, 4.
  - Exemplary damages, 4.
  - For consequential losses, 48.
  - Recoverable for natural and probable consequences, 63.
  - Elements of compensation, 128
    - Pecuniary losses, 129.
      - Loss of earnings, 130.
      - Impairment of earning capacity, 130.
      - Expenses of litigation, 132.
      - Counsel fees, 129, 132.
      - Expenses of prior litigation, 134.
    - Physical pain and inconvenience, 137.
    - Mental suffering, 140.
      - As the basis of a cause of action, 140.
      - Where injury is willful or malicious, 145.
  - Resulting in physical suffering, 146.
    - In actions of tort, 149.
      - Proximate and remote consequences, 153.
    - In personal injury cases, 149.
    - Under civil damage laws, 154.
    - Indecent assault, 152 (note).
    - Injury to child, recovery by parent, 154.
    - For injury to realty and personality, 159.
    - For false imprisonment, 152, 155.
    - Criminal conversation, 154.
    - Seduction, 153.
    - Abduction of children, 154.
    - Prospective mental suffering, 151.
    - For indignities to corpse, 157.
  - In actions of contract, 160.
  - In actions against telegraph companies, 164.
  - Kinds of mental injury compensated, 169.
  - Damages for mental suffering compensatory, not exemplary, 172.
- Reduction of loss, specific reparation, 183.
- Reparation preventing actual loss, 184.
  - Reparation accepted, 185.
  - Reparation by third party, 186.
  - Benefits incident to injury, 187.
- Injuries to limited interests, 189.
- Interests in real property in possession and in expectancy, 189.
  - Special property and ultimate ownership in personal property, 190.
  - Interest of mortgagors and mortgagees, 191.
  - Joint interests, 192.

[The figures refer to pages]

## COMPENSATORY DAMAGES,

- Defined, 39.
- Compensation, the principle governing award of damages, 40.
- Fall short of actual indemnity, 40.
- Nominal and substantial compensation, 41.
- When amount a question of law, 41.
- When amount a question for jury, 41.
- Compensation recoverable only for proximate losses, 42.
- Proximate and remote consequences in general, 42.
- Direct and consequential losses, 43.
- Always recoverable for direct losses, 44.
- Direct losses, 44.
  - Direct, but unexpected, consequences, 45.
- Consequential losses, 48, 63.
  - Proximate and remote consequential losses, 48.
  - Damages recoverable for natural and probable consequences, 53.
  - Illustrations of proximate and remote consequences, 58.
  - Avoidable consequences remote, 60.
  - Intervention of third persons, 61.
  - Consequential damages for torts, 64, 65.
  - Consequential damages for breach of contract, 64, 68.
    - Hadley v. Baxendale, 71.
      - Damages arising under ordinary circumstances, 74.
      - Damages arising from circumstances not contemplated, 77.
      - Notice of special circumstances, 80.
      - Losses on subcontracts, 82 (note).
      - General result of Hadley v. Baxendale, 86.
      - Motive inducing breach of contract, 87.
    - Contract to convey land, effect of bad faith, 87.
- Avoidable consequences, 87.
  - Applications and illustrations, 91.
  - Rule of contributory negligence distinguished from that of avoidable consequences, 96.
- The required certainty of damages, 99.
  - Amount of loss must be shown, 99.
  - Profits or gains prevented, 103.
    - Profits, illustrations, 107.
    - Loss of personal property. wholesale market value, the measure of, 112.
    - Prospective gains from property totally destroyed, 112.
  - Entirety of demand, recovery in single action, 113.
- Time to which compensation may be recovered, past and future losses, 115.
  - Repetition of wrong, 115.
  - Continuing torts and breaches of contract, 116.
  - Damages caused by permanent structures, 121.

[The figures refer to pages]

# CONSEQUENTIAL DAMAGES—(Cont'd)

- Damages arising from circumstances not contemplated, 77.
- Failure to deliver telegram, 403.
- Cipher telegrams, 80, 411.
- Hadley v. Baxendale, 86.
- Contracts, motive inducing breach, 87.
- Avoidable consequences, 87.
- Applications and illustrations, 91.
- Limitations of rule, 96.
- In actions against carriers, 376.
- In actions against telegraph companies, 391.
- Trespass to real property, 503.

# CONSTITUTIONAL LAW,

- Right to damages as a species of property within constitutional guaranties, 2.
- Exemplary damages for conduct which is also a crime, 306 (note).
- Constitutionality of statutes giving action for death by wrongful act, 425.

# CONTEMPLATED CONSEQUENCES,

- Damages for torts need not be actually contemplated, 66.
- Of breach of contract, 68.
- Hadley v. Baxendale, 71.
- Failure to deliver telegram, 403, 411.

# CONTINUING TORTS,

- Damages for, 116.
- Illustrations, 118.

# CONTRACTS,

- Damages for direct losses always recoverable, 47.
- Contemplation of consequences of breach, 68.
- Consequential damages for breach, 68.
- Hadley v. Baxendale, rule of damage, 71.
- Damages arising from ordinary circumstances, 74.
- Damages arising under ordinary circumstances, 74.
- Damages arising from circumstances not contemplated, 77.
- Losses on subcontracts, 82 (note).
- Notice of special circumstances, 80.
- General result of Hadley v. Baxendale, 86.
- Motive inducing breach, 87.
- Fraud in contract to convey land, effect, 87.
- Damages for continuing breach of, 116.
- Covenants for support and maintenance, damages for breach, 118 (note).
- For sale of goods, see "Sale of Goods."
- Damages for breach, expenses of litigation, 132.
- Mental suffering in actions of, 160.

[The figures refer to pages]

**CONTRACTS—(Cont'd)**

- Liquidated damages and penalties, 196.
  - Not to carry on business, liquidated damages for breach, 210.
  - Liquidated damages for delay in performance of, 211.
- Alternative contracts, damages for breach, 220.
- Interest by contract a debt, 224.
- Payable in gold, damages for breach, 297.
- Exemplary damages for breach, 310, 318.
- General and special damages for breach, 337.
- Actions against telegraph companies tort or contract, 386, 389, 390.
- To sell real property, breach by vendor, 509.
- To sell real property, breach by vendee, 512.

**CONTRIBUTORY NEGLIGENCE,**

- Rule of, distinguished from avoidable consequences, 96.

**CONVERSION,**

- See, also, "Trover."
- Value, time, and place of assessment, 281.
- Highest intermediate value, 284.
- Sale of goods, damages as for, 362.

**CORPORATIONS,**

- Refusal to transfer stock, highest intermediate value, 285.
- Liability for exemplary damages, 326.

**CORPSE,**

- Damages for mental suffering caused by mutilation of, 157.
- Breach of contract to transport, mental suffering as element of damages, 163.
- See, also, "Dead Bodies."

**COSTS,**

- Nominal damages to carry costs, 36.
- Of litigation not recoverable as damages, 182.
- Of prior litigation as damages, 134.
- As element of damages in trespass for mesne profits, 497.

**COUNSEL FEES,**

- Compensation for not recoverable, 129, 132.
- Expenses of prior litigation, 134.
- Recovery for, in action for breach of covenant, 514.

**COURT,**

- See "Province of Court and Jury."

**COVENANTS,**

- Damages for breach, seisin, and right to convey, 518.
- Warranty and quiet enjoyment, 515.
- Against incumbrances, 517.
- In leases, 517.

[The figures refer to pages]

**CRIMES,**

Exemplary damages where tort is also a crime, 310, 322.

**CRIMINAL CONVERSATION,**

Damages for mental suffering, 154.

Exemplary damages, 322.

**CROP,**

Damages for breach of warranty of seeds, 110.

Damages for loss of unmaturing crop, 110.

**D****DAMAGES,**See "Compensatory Damages"; "Exemplary Damages";  
"Nominal Damages."

Definition and nature, 1.

A species of property, 2.

Assignability, 2.

Right to, protected by constitutional guaranties, 2.

Right to, vests immediately on commission of wrong, 2.

Common-law theory of, 4.

Compensation, not restitution, the measure of, 4.

Exemplary damages, 7, 301.

Mixed question of law and fact, 8.

Recoverable only for violation of legal rights, 9.

Classification of, 28.

Nominal damages, definition and general nature, 29.

Awarded only when law presumes damage, 29.

De minimis non curat lex, 29, 33.

Will not support action when damages are of the gist, 29.

Nominal damages against public officers for neglect of duty,  
33 (note).

Nominal damages establish rights, 34.

New trial and costs, 36.

Compensatory damages, defined, 39.

When amount a question of law, 40.

When amount a question for jury, 41.

Compensation recoverable only for proximate losses, 42.

Proximate and remote consequences in general, 42.

Direct and consequential losses, 43.

Direct losses, 44.

Compensatory damages always recoverable for direct  
losses, 44.

Consequential losses, 48.

Proximate and remote consequential losses, 48.

Illustrations, 58.

Avoidable consequences, 60.

[The figures refer to pages]

**DAMAGES—(Cont'd)**

- Compensation recoverable for natural and probable consequences, 63.
- Consequential damages for torts, 64, 65.
- Consequential damages for breach of contract, 64, 68.
  - Hadley v. Baxendale, 71.
  - Damages arising under ordinary circumstances, 74.
  - Damages arising from circumstances not contemplated, 77.
  - Failure to deliver telegram, 403, 411.
  - Notice of special circumstances, 80, 403.
  - Losses on subcontracts, 82 (note.)
  - General result of Hadley v. Baxendale, 86.
  - Motive inducing breach of contract, 87.
- For avoidable consequences, 87.
- Applications and illustrations, 91.
- The required certainty of damages, 90.
- Amount of loss must be shown, 90.
- Profits or gains prevented, 103.
  - Illustrations, 107.
- Prospective gains from property totally destroyed, 112.
- Entirety of demand, recovery in single action, 113.
- Injury to person and property by same act, 114.
- Time to which compensation may be recovered, past and future losses, 115.
- Repetition of wrong, 115.
- Continuing torts and breaches of contract, 116.
- Damages caused by permanent structures, 121.
- Elements of compensation, 128.
- Pecuniary losses, 129.
  - Expenses of litigation, 129, 132.
  - Counsel fees, 129, 132.
  - Loss of earnings, 130.
  - Impairment of earning capacity, 130.
  - Expenses of prior litigation, 134.
- Physical pain and inconvenience, 137.
- Mental suffering, 140.
  - Mental suffering as the basis of a cause of action, 140.
    - Where injury is willful or malicious, 145.
  - Resulting in physical suffering, 146.
  - Mental suffering in actions of tort, 149.
    - Personal injury cases, 149.
    - Prospective mental suffering, 151.
    - Assault and battery, 152.
    - False imprisonment, 152.
    - Indecent assault, 152 (note).
    - Libel and slander, 153.
    - Malicious prosecution, 153.



[The figures refer to pages]

**DAMAGES—(Cont'd)**

- Seduction, 153.
- Abduction of children, 154.
- Criminal conversation, 154.
- Injury to child, recovery by parent, 154.
- Under civil damage laws, 154.
- For assault, 155.
- Ejection of passenger, 156.
- Indignities to corpse, 157.
- As proximate or remote consequences, 158.
- Injury to realty and personalty, 159.
- Mental suffering in actions of contract, 160.
- Actions against telegraph companies, 164.
- Kinds of mental injury compensated, 169.
- For mental suffering compensatory, not exemplary, 172.
- Aggravation and mitigation of, 173.
- Reduction of loss, 183.
  - Injured party cannot be compelled to accept specific reparation, 183.
  - Reparation preventing actual loss, 184.
  - Reparation accepted, 185.
  - Reparation by third party, 186.
  - Benefits incident to injury, 187.
- Injuries to limited interest, 189.
  - Interests in real property in possession and in expectancy, 189.
  - Special property and ultimate ownership in personal property, 190.
  - Interest of mortgagors and mortgagees, 191.
  - Joint interests, 192.
- On penal bonds, 194.
- Liquidated damages and penalties, 196.
  - Intent of parties, 196.
  - Rules of construction, 200.
  - Breach of contract of sale, 210.
  - For breach of marriage promise, 210.
  - For disclosure of trade secrets, 212.
- Liquidated damages for failure to abate nuisance, 211.
  - Stipulated sum where damages are certain, 213.
- For breach of alternative contract, 220.
- Nonpayment of money, interest, 223.
- Interest, as a debt and as damages, 224.
  - Interest as damages, 227.
  - Interest, general rule, 232.
  - Interest on nonpecuniary losses, 233.
  - Interest on pecuniary losses, liquidated demands, 235.
  - Interest on taxes, 238.
  - For vexatious appeal, interest, 239 (note).

[The figures refer to pages]

**DAMAGES—(Cont'd)**

Interest on pecuniary losses, unliquidated demands, 240.

Contracts, 245.

Torts, 249.

Interest where defendant not responsible for delay, 257.

Compound interest, 263.

Value, definition, 268.

Value of stocks, bonds, and other securities, 275 (note),  
276 (note).

Value of good will of established business, 276.

Value peculiar to owner, 277.

Time and place of assessment, 281.

Condemnation proceedings, 281.

For conversion, 281.

Breach of contract of sale, 282.

Highest intermediate value, 284.

Medium of payment, legal tender, 295.

Contracts payable in gold, 297.

Foreign currency, value, 298.

Alternative medium of payment, damages for breach, 299.

Mercantile securities, 299.

Contract to pay in commodities, 300.

Exemplary damages, 301.

Liability of principal for act of agent, 324.

Pleading and practice, 329.

Allegation of, the ad damnum, 329.

Cannot exceed amount pleaded, 329.

Form or statement, 332.

General damages defined, 332.

Special damages defined, 332.

Excessive and inadequate damages, 341.

Remitting excess, 346.

Breach of contract for sale of goods, 350.

See, also, "Sale of Goods."

In actions against carriers, 369.

See, also, "Carriers."

In actions against telegraph companies, 386.

See, also, "Telegraph Companies."

For death by wrongful act, 421.

Wrongs affecting real property, 493.

See, also, "Real Property."

For detention of dower, 498.

Breach of marriage promise, 521.

**DAMNUM ABSQUE INJURIA,**

Meaning of phrase, 9.

Damages not recoverable for, 9.

Damage incident to authorized conduct, 15-19.

[The figures refer to pages]

**DEAD BODIES,**

- Mutilation of, mental suffering as element of damage, 157.
- Disturbance of sepulture, mental suffering as element of damages, 157.
- Breach of contract to transport, mental suffering as element of damages, 163.
- Breach of contract to bury, mental suffering as element of damages, 163.

**DEATH BY WRONGFUL ACT,**

- The rule at common law, 421.
- History of rule, 421.
- Reason of rule, 422.
- Right of action under statute, 423.
  - Lord Campbell's act, 423.
  - As a new action, 424.
  - Constitutionality of statutes, 425.
  - Strict and liberal construction of statute, 425.
  - Damages in statutory action, 425.
    - Limitations on amount, 427.
- Damages for pecuniary loss, 425.
  - Meaning of pecuniary, 427.
- No damages for solatium, 428.
  - Loss of society and companionship, 430.
- Exemplary damages, 433.
- Damages for injury to deceased, 436.
- Medical and funeral expenses, 438.
- Prospective pecuniary losses, 440.
  - Future care and support, 441.
  - Evidence showing value of future care and support, 444.
  - Action by widow, evidence of number of children, 446.
  - Loss of education and personal training, 447.
  - Future services, 449.
    - Death of wife, 449.
    - Death of minor child, 451.
  - Expectancy of benefit after majority, 458.
- Prospective benefits, 462.
  - Death of adult child, 462.
  - Death of parent of adult child, 468.
  - Death of collateral relative, 471.
- Prospective inheritance, 471.
- Evidence of pecuniary condition of beneficiaries, 474.
- Expectation of life, life tables, 476.
- Interest as damages, 478.
- Reduction of damages, 479.
- Discretion of jury, 481.
  - New York rule, 482.
  - Excessive verdict, reduction of amount, 485.
  - Inadequate verdict, 487.

[The figures refer to pages]

**DEATH BY WRONGFUL AOT—(Cont'd)**

Nominal damages, 488.

Allegation of damages, 490.

**DEFAMATION,**

Words causing mental suffering alone are not actionable, 143.

Exemplary damages, 320.

General and special damages, 336.

Injury to reputation in action for breach of marriage promise, 523.

**DELAY,**

In transportation, damages against carrier, 374.

In carriage of passengers, damages for, 381.

**DE MINIMIS NON CURAT LEX,**

Application of maxim, 29, 83.

**DEMURRAGE,**

When a natural consequence of breach of contract, 79 (note).

**DETINUE,**

Highest intermediate value, 285.

**DISCRETION,**

Of court and jury as to damages, 8.

Of jury, damages for pain, etc., 139.

In estimating damages for mental suffering, 173.

Damages for wrongful death, 481.

**DOWER,**

Damages for detention of, 498.

**E**

**EARNING CAPACITY,**

Impairment of as element of damages, 130.

**EARNINGS,**

Loss of as element of damages, 130.

**EJECTION,**

Of passenger, damages for, 381.

**EJECTMENT,**

Whether damages recoverable in, 493.

**EMINENT DOMAIN,**

Interest as damages, 256.

Value, time and place of assessment, 281.

**ENTIRETY OF DEMAND,**

Damages from single cause of action must be recovered in single action, 113.

Injury to person and property by same act, 114.

Past and future losses, 115.

[The figures refer to pages]

**EQUITY,**

Exemplary damages not allowed, 319.

**EVIDENCE,**

To show value of future care and support, 444.

Of number of children in action for death by wrongful act, 446.

Of pecuniary condition of beneficiaries, death by wrongful act, 474.

Expectation of life, life tables, 476.

Breach of marriage promise, defendant's financial and social position, 522.

**EXCESSIVE DAMAGES,**

Province of court and jury, 341.

Death by wrongful act, reduction of amount, 485.

Action for breach of marriage promise, 524.

**EXEMPLARY DAMAGES,**

Exception to common-law theory, 4, 7.

Damages for mental suffering compensatory, not exemplary, 172.

Aggravation and mitigation, 173, 315.

Defined, 301.

Nature and origin of doctrine, 301.

Conflict of authorities, 301.

Criticism of the doctrine, 304.

Jurisdiction in which not recoverable, 307.

Jurisdictions, where recoverable, 310.

Not recoverable unless conduct otherwise actionable, 310.

When recoverable in general, 310.

Liability to does not survive, 310, 311.

In action against joint wrongdoers, 311.

Actual malice, 313.

Oppression, brutality, and insult, 313.

Wantonness, 313.

Fraud, 314.

Gross negligence, 314.

Province of court and jury, 316, 348.

In what actions recoverable, 318.

Where tort is also a crime, 306, 310, 322.

Breach of contract, 310, 318.

For breach of marriage promise, 310, 529.

In action on statutory bond, 310.

Assault and battery, 319.

Defamation, 319.

False imprisonment, 319.

Malicious prosecution, 319.

Abuse of process, 320.

Libel and slander, 320.

Injuries to person or property, 321.

Replevin, 321.

[The figures refer to pages]

**EXEMPLARY DAMAGES—(Cont'd)**

- Trover, 321.
- Criminal conversation, 322.
- Seduction, 322.
- In actions against carriers of passengers, 380.
- In actions against telegraph companies, 418.
- Not recoverable in action for death by wrongful act, 433.
- Trespass to real property, 504.
- Waived by coming into equity, 319 (note).
- Liability of principal for act of agent, 324.
- Liability of master for act of servant, 324.
- Liability of corporations, 328.
- Need not be specially pleaded, 334.
- Setting aside excessive verdict, 349.

**F**

**FALSE IMPRISONMENT,**

- Damages for mental suffering, 152, 155.
- Aggravation and mitigation of damages, 177.
- Exemplary damages, 319.

**FINES AND PENALTIES,**

- Interest on, 238.

**FLOWAGE,**

- Of lands, nominal damages for, 33 (note).
- Backing water on mill, 109.

**FORBIDDEN CONDUCT,**

- Damage incident to, 20.

**FRAUD,**

- Ground for exemplary damages, 310.

**FRIGHT,**

- As the basis of a cause of action, 143, 171.
- Resulting in physical suffering, 146.
- Damages for, 381.

**FUNERAL EXPENSES,**

- As element of damage in action for death by wrongful act, 438.

**G**

**GIFTS,**

- Loss of prospective gifts, death by wrongful act, 462.

**GOOD WILL,**

- Value of, 278.

## H

## HADLEY v. BAXENDALE,

- Damages for breach of contract, 71.
- Three rules deduced from, 73.
- Criticism of rule declared, 73 (note).
- Damages arising from circumstances not contemplated, 77.
- General result of, 86.
- Notice of special circumstances, 88.
- Rule applied in cases of failure to deliver telegram, 403, 411.

## HIGHEST INTERMEDIATE VALUE,

See "Value."

## HUSBAND AND WIFE,

- Damages for mental suffering for alienation of husband's affections, 154.

## I

## IMPROVEMENTS,

- Deductions for, in action for detention of real property, 495.

## INADEQUATE DAMAGES,

- Province of court and jury, 341.
- Death by wrongful act, 487.
- Action for breach of marriage promise, 524.

## INCONVENIENCE,

- Compensation for, 137.

## INCUMBRANCES,

- Covenants against, damages for breach, 517.

## INHERITANCE,

- Loss of prospective inheritance, death by wrongful act, 471.

## IN JURE NON REMOTA CAUSA SED PROXIMA SPECTATUR,

- Maxim explained, 42.

## INJURIA SINE DAMNO,

- Meaning of phrase, 9.

## INSURANCE,

- No reduction of damages in action for death by wrongful act, 480.

## INTEREST,

- Stipulations in evasion of usury laws, liquidated damages or penalties, 220.
- Definition, 223.
- As a debt and as damages, 224.
- The English doctrine, 225.

[The figures refer to pages]

**INTEREST—(Cont'd)**

- Interest by agreement, 225.
- Interest as damages, 227.
- Discretion of jury, 227.
- The American doctrine, 227.
- Interest as a debt, 228.
- Interest as damages, 229.
- Must be recovered with the principal, 230.
- Rate, 231.
- General rule, 232.
- On nonpecuniary losses, 233.
- Pecuniary losses, liquidated demands, 235.
- Recoverable on notes after maturity, 236 (note).
- On fines and penalties, 238.
- On judgments, 238.
- On taxes, 238.
- Between verdict and judgment, 239 (note).
- For vexatious appeal, 239 (note).
- Where defendant not responsible for delay, 257.
- Pecuniary losses, unliquidated demand, 240.
- Contracts, 245.
- Damages made certain by computation or reference to recognized standards, 245.
- Demand for accounting, commencement of suit, 247.
- Torts, 249.
- On discretionary damages, 250.
- Province of court and jury, 250.
- On property losses in general, 251.
- Property destroyed, taken, converted, and the like, 253.
- Property destroyed by negligence, 255.
- Condemnation proceedings, 256.
- Where defendant not responsible for delay, 257.
- On overdue paper, contract and statute rate, 258.
- Compound interest, 263.
- As damages in action for death by wrongful act, 478.
- As damages for detention of real property, 495.

**INTOXICATING LIQUORS,**

- Civil damage laws, damage for mental suffering, 154.
- Liquidated damages for breach of contract to abstain from, 213 (note).

**J**

**JOINT WRONGDOERS,**

- Liability to exemplary damages, 311.



[The figures refer to pages]

**JUDGMENT,**

Interest on, 238.

Interest on verdict before, 239 (note).

**JURY,**

See "Discretion"; "Province of Court and Jury."

**L**

**LANDLORD AND TENANT,**

Mental suffering as element of damages for wrongful eviction,  
159.

**LAWFUL AND UNLAWFUL CONDUCT,**

Analysis of, 15.

Damage incident to authorized conduct, 15.

Forbidden conduct, 20.

Conduct forbidden for benefit of public, 20, 22.

Conduct neither authorized nor forbidden, 24.

Malicious conduct, 25.

Negligent conduct, 26.

Conduct at peril, 26.

Analysis of legal wrongs, 28.

**LEASES,**

Covenants in, damages for breach, 519.

**LEGAL TENDER ACT,**

Damages under, 296.

Result of decisions, 296.

**LEGAL WRONGS,**

See "Wrong and Damage."

**LIBEL AND SLANDER,**

Words causing mental suffering alone not actionable, 143.

Damages for mental suffering, 153.

Aggravation and mitigation of damages, 178.

Provocation, 178.

Common-law retraction, 179.

Honest belief, rumors, 179.

Plaintiff's character and position, 181.

Exemplary damages, 320.

General and special damages, 336.

**LIFE TABLES,**

Evidence of expectation of life, 476.

**LIQUIDATED DAMAGES,**

In general, 194.

Defined, 196.

Penalties, 196.

Equity will not relieve against, 196.

[The figures refer to pages]

**LIQUIDATED DAMAGES—(Cont'd)**

- Intent of parties, 198.
  - Distinction between intent to liquidate and intent that sum named shall be paid, 198.
  - Must be estimated on basis of just compensation, 199.
  - Contract for distinguished from penal bond, 200.
  - General rule of construction, form of contract, 200, 202, 203.
    - Contract in the alternative, 203.
    - Contract in form of common-law bond, 203.
    - Contract providing for penalty in terms, 203.
    - Contract providing for liquidated damages in terms, 204.
    - Collateral sum in terrorem, 204.
    - Sum payable on nonpayment of smaller sum, 205.
    - Sum stipulated not proportioned to injury, 206.
    - Stipulated sum where damages are uncertain, 209.
      - Breach of agreement not to carry on business, 210.
      - Breach of contract of sale, 210.
      - For breach of marriage promise, 210.
      - For delay in performance of contract, 211.
      - For failure to abate nuisance, 211.
      - For disclosure of trade secrets, 212.
    - Stipulated sum where damages are certain, 213.
    - Sum deposited to be forfeited on breach, 215.
    - Sum stipulated for breach of contract for several things, 216.
    - Partial breach, 219.
  - For breach of contract to abstain from intoxicating liquors, 213 (note).
  - Alternative contract not a contract for, 220.
  - Stipulations in evasion of usury laws, 220.
  - Interest on, 235.
- LORD CAMPBELL'S ACT,**
- Death by wrongful act, 425.

**M**

**MALICE,**

- Exemplary damages recoverable for malicious torts, 310.

**MALICIOUS CONDUCT,**

- Liability for damage by, 25.

**MALICIOUS PROSECUTION,**

- Damages for mental suffering, 153.
- Exemplary damages, 319.
- Pleading of special damage, 336.

**MARKET VALUE,**

- Defined, 271.
- Evidence of real value, 271, 274.

[The figures refer to pages]

**MARRIAGE,**

See "Breach of Marriage Promise."

**MASTER AND SERVANT,**

Damages for discharge, duty to seek other employment, 93.

Tort of servant, liability of master for exemplary damages, 324.

**MEDICAL EXPENSES,**

As element of damage in action for death by wrongful act, 438.

**MENTAL SUFFERING,**

Compensation for, 140.

As the basis of a cause of action, 140.

Where injury is willful or malicious, 145.

Resulting in physical suffering, 146.

In actions of tort, 149.

Action for personal injuries, 149.

Assault and battery, 152.

For false imprisonment, 152, 155.

Indecent assault, 152 (note).

For libel and slander, 153.

For malicious prosecution, 153.

Abduction of children, 154.

Criminal conversation, 154.

Injury to child, recovery by parent, 154.

Ejection of passenger by carrier, 156.

For indignities to corpse, 157.

Proximate and remote consequences, 158.

For injury to reality and personality, 159.

In actions of contract, 160.

In actions against telegraph companies, 164.

Kinds of mental injury compensated, 169.

Damages for, compensatory, not exemplary, 172.

Damages for, in actions against carriers, 380.

Damages for, in action for death by wrongful act, 427, 428.

In action for breach of marriage promise, 523.

**MITIGATION OF DAMAGES,**

See "Aggravation and Mitigation."

**MONEY,**

Damages for nonpayment measured by interest, 223.

Means "coin" in absence of statutes, 295.

**MORTGAGES,**

Injuries to mortgaged property, 191.

Interest of mortgagee, 191.

Interest of mortgagor, 191.

**MOTIVE,**

Inducing breach of contract immaterial, 87.

**MUNICIPAL CORPORATIONS,**

Liability for interest, 237.

**N**

**NATURAL AND PROBABLE CONSEQUENCES,**

Of torts and breaches of contract, 63, 64.

What are natural consequences, 63.

**NEGLIGENCE,**

Liability for damage by, 26.

Causing mental suffering alone not actionable, 142.

Exemplary damages recoverable for gross negligence, 310.

See, also, "Contributory Negligence."

**NEGOTIABLE INSTRUMENTS,**

Interest on overdue paper, contract and statute rate, 258.

Value of promissory note, 274.

Maker cannot show his own insolvency, 276.

Value, 275.

**NEW TRIAL,**

For error in regard to nominal damages, 36.

For inadequate or excessive damages, death by wrongful act,  
487.

**NOMINAL DAMAGES,**

Definition and general nature, 29.

Awarded only when law presumes damage, 29.

De minimis non curat lex, 29, 33.

Will not support action when damages are of the gist, 29.

Against public officers for neglect of duty, 33 (note).

Establish rights, 34.

New trial and costs, 36.

Need not be specially pleaded, 333.

In action for death by wrongful act, 488.

For nuisance to real property, 506.

**NONPECUNIARY INJURIES,**

Province of court and jury, 340.

**NUISANCE,**

A continuing tort, damages for, 119.

Damages for nuisance by permanent structure, 126.

Liquidated damages for failure to abate, 211.

To real property, damages, 504.

When nominal damages recoverable, 506.

**O**

**OFFICERS,**

Public, nominal damages for neglect of duty, 33 (note).

**P****PAIN,**

Compensation for physical pain, 137.

**PARENT AND CHILD,**

Abduction of child, damages for mental anguish, 154.

Injury to child, right of parent to recover for mental suffering, 154.

**PARTNERSHIP,**

Damages for breach of contract of partnership, 111.

**PASSENGERS,**

Damages for injury to, 378, 380.

Exemplary damages and mental suffering, 380.

Damages for failure to carry to destination, 381.

Wrongful ejection, 381.

Damages for delay or failure to carry, 381.

**PAST AND FUTURE LOSSES,**

Continuing torts and breaches of contract, 115.

Illustrations, 118.

Time to which compensation may be recovered, 115.

Repetition of wrong, 116.

Damages for nuisance, 119.

Damages caused by permanent structures, 121.

Authorized conduct, 122.

Forbidden conduct, 123.

Trespass, 123.

Conduct neither authorized nor forbidden, 123.

Prospective mental suffering, 151.

Death by wrongful act, prospective pecuniary losses, 440.

**PATENTS,**

Counsel fees in patent suits, 133 (note).

**PECUNIARY LOSSES,**

Counsel fees, 129, 132, 134.

Damages for, 129.

Impairment of earning capacity, 130.

Loss of earnings, 130.

Expenses of litigation, 132.

Expenses of prior litigation, 134.

Province of court and jury, 338.

Damages for, in action for death by wrongful act, 425.

Meaning of "pecuniary," 427.

**PENAL BONDS,**

See "Bonds."

[The figures refer to pages]

**PENALTIES,**

- In penal bonds, 194.
- Defined, 196.
- Liquidated damages or, 196.
- Intent of parties, 196.
- Distinction between intent to liquidate and intent that sum named shall be paid, 198.
- Rules of construction, 200.
  - General rule of construction, form of contract, 203.
  - Contract in form of common-law bond, 203.
  - Contract in the alternative, 203.
  - Contract providing for penalty in terms, 203.
  - Contract providing for liquidated damages in terms, 204.
- Collateral sum in terrorem, 204.
- Sum payable on nonpayment of smaller sum, 205.
- Sum stipulated not proportioned to injury, 206.
- Stipulated sum where damages are uncertain, 209.
- Stipulated sum where damages are certain, 213.
- Sum deposited to be forfeited on breach, 215.
- Sum stipulated for breach of contract for several things, 216.
- Partial breach, 219.
- Stipulations in evasion of usury laws, 220.
- Trespass to real property, 504.

**PERIL,**

- Conduct at peril, 26.

**PERSONAL INJURY,**

- Duty to employ physician or surgeon, 95.
- Damages for, entirety of demand, 113.
  - Injury to person and property by same act, 114.
- Damages for mental suffering, 149.
- Exemplary damages, 321.
- General and special damages, 335.
- Liability of carriers, 380.

**PERSONAL SERVICES,**

- Damages for discharge, duty to seek other employment, 93.

**PLEADING AND PRACTICE,**

- Allegation of damage, the ad damnum, 329.
- Damages cannot exceed amount pleaded, but may be less, 329.
- Form of statement, 332.
- General and special damages, 332.
  - Compensatory damages may be general or special, 333.
  - Illustrations, 335.
- Exemplary damages need not be specially pleaded, 334.
- Province of court and jury, 337.
- Pecuniary injuries, 338.
- Nonpecuniary injuries, 340.

[The figures refer to pages]

**PLEADING AND PRACTICE—(Cont'd)**

- Excessive and inadequate damages, 341.
- Breach of marriage promise, 524.
- Setting aside verdict, 341, 349.
- Remitting excess, 346.
- Exemplary damages, 348.
- Death by wrongful act, nominal damages, 488.
- Allegation of damages, 490.

**PRETIUM AFFECTIONIS,**

- Defined, 279.
- Not a basis for compensation, 279.

**PRICE,**

- See "Value."

**PRINCIPAL AND AGENT,**

- Liability of principal for exemplary damages, 324.

**PROCESS,**

- Abuse of, exemplary damages, 320.

**PROFITS,**

- Meaning of term, 103 (note).
- Damages for loss of, 103.
- Of established business, 107.
- Prospective gains from property totally destroyed, 112.
- Damages for loss of, in actions against telegraph companies, 392.
- Trespass for mesne profits, 493.
- For how long recoverable, 496.

**PROVINCE OF COURT AND JURY,**

- Damages a question of mixed law and fact, 8.
- Compensatory damages, when a question for court, and when for jury, 40, 41.
- Proximate and remote cause, 50 (note).
- As to matters in aggravation or mitigation, 174.
- Interest as damages, 229.
- Discretion of jury, 227.
- Interest on unliquidated demands, 240.
- Torts, 250.
- Discretion in awarding highest intermediate value, 292.
- As to exemplary damages, 316, 348.
- Measure of damages a question of law for the court, 337.
- Pecuniary injuries, 338.
- Nonpecuniary injuries, 340.
- Damages for mental suffering, 173.
- Excessive and inadequate damages, 341.
- Setting aside verdict, 341, 349.
- Death by wrongful act, discretion of jury, 481.

**PROVOCATION,**

- In mitigation of exemplary damages, 315.

## INDEX

627

[The figures refer to pages]

### PROXIMATE AND REMOTE CAUSE,

- Only proximate consequences compensated, 5, 42.
- Not capable of perfect or general definition, 42.
- Proximate and remote consequences in general, 42.
- Direct and consequential losses, 43.
- Direct losses, 44.
- Direct losses necessarily proximate, 44.
- Direct, but unexpected, consequences, 45.
- Consequential losses, 48.
- Consequential losses in general, 48.
- Effect of intermediate cause, 48.
- Illustrations, 55 (note).
- Proximate and remote consequential losses, 48.
- Illustrations, 58.
- Questions for court and jury, 50 (note).
- Avoidable consequences, 60.
- Intervention of third persons, 61.
- Consequential damages for tort, 64, 65.
- Consequential damages for contract, 64, 68.
- Consequential damages for breach of contract, 68.
- Hadley v. Baxendale, 71.
- Damages arising under ordinary circumstances, 74.
- Damages arising from circumstances not contemplated, 77.
- Notice of special circumstances, 80.
- Losses on subcontracts, 82 (note).
- General result of Hadley v. Baxendale, 86.
- Avoidable consequence, not a proximate result, 87.
- Mental suffering, 158.
- Actions against telegraph companies, 392.
- Remote and speculative damages in actions against telegraph companies, 399.

### PUBLIC OFFICERS,

- Nominal damages for neglect of duty, 83 (note).

### PUBLIC WRONGS,

- Private action for, 20, 22.

### PUNITIVE DAMAGES,

- See "Exemplary Damages."

## R

### REAL PROPERTY,

- Damages for detention of real property, 493.
- Ejectment, 493.
- Trespass for mesne profits, 494.
- Annual value, how estimated, 494.
- Interest, 495.
- Deductions for improvements, 495.



[The figures refer to pages]

**REAL PROPERTY—(Cont'd)**

- Deductions for necessary expenses, 495.
- For how long profits recoverable, 496.
- Costs of ejectment suit, 497.
- Damages for detention of dower, 498.
- Injuries to real property, trespasses, 499.
  - Temporary injuries, 499.
  - Permanent injuries, 500.
  - Cost of repairing, 502.
  - Avoidable consequences, 503.
  - Consequential damages, 503.
  - Exemplary damages and penalties, 504.
  - Nuisances, 504.
    - When nominal damages recoverable, 506.
  - Waste, 508.
- Contracts of sale, breach by vendor, 509.
  - The better rule, 509.
  - Nominal damages only, the English rule, 510.
  - Fraudulent representations by vendor, 511.
  - Breach by vendee, 512.
- Breach of covenants, selsin, and right to convey, 513.
  - Warranty and quiet enjoyment, 515.
    - The consideration as the measure, 515.
    - The value at eviction as the measure, 516.
  - Against incumbrances, 517.
    - Permanent incumbrances, 517.
    - Removable incumbrances, 518.
    - Eviction total or partial, 518.
  - Covenants in leases, 519.

**RECOURPMENT,**

- Damages for breach of warranty, 364.

**REDUCTION OF DAMAGES,**

- Death by wrongful act, benefit received, 479.

**REMEDIES,**

- Common-law remedies, 1.

**REMITTER,**

- Of excessive damages, 346.
- Action for death by wrongful act, 485.

**REMOTE CAUSE,**

- See "Proximate and Remote Cause."

**REPLEVIN,**

- Interest as damages, 253.
- Highest intermediate value, 285.
- Sureties on bond not liable for exemplary damages, 319 (note).
- Exemplary damages, 321.

[The figures refer to pages]

**REWARDS,**  
Damage for loss of, 110.

**RIGHTS,**  
See "Wrong and Damage."

**S**

**SALE OF GOODS,**  
Liquidated damages for breach of contract, 210.  
Value, time and place of assessment, 282.  
Nondelivery, highest intermediate value, 285.  
Action by seller where property has not passed, damages for nonacceptance, 350, 351.  
To be manufactured, damages for nonacceptance, 352.  
Where property has passed, damages for nonpayment, 354.  
Action by buyer, damages for nondelivery, 355.  
Damages where there is market price, 358.  
Special damages, 359.  
Communication of special circumstances, 360.  
Damages as for conversion, 362.  
Damages for breach of warranty, 363.  
Warranty of seeds, 110.  
Diminution of damages, recoupment, 364.  
Measure of damages, 365.  
Warranty of title, 368.

**SALE OF LANDS,**  
See "Real Property."

**SEDUCTION,**  
Damages for mental suffering, 153.  
Exemplary damages, 322.

**SEISIN,**  
Covenant of, damages for breach, 513.

**SOLATIUUM,**  
Damages for wounded feelings in action for death by wrongful act, 428.

**SPECULATIVE DAMAGES,**  
See "Certainty."

**STOCKS,**  
Value, 275.  
Highest intermediate value, 284.  
Damages on stock contracts in Pennsylvania, 292.

**SUBCONTRACT,**  
Losses on, when recoverable, 82 (note).

**SURETIES,**  
On bond for distress warrant, exemplary damages, 319 (note).

**SURVIVAL,**  
Of liability to exemplary damages, 310, 311.

**T****TAXES,**

Interest on, 238.

**TELEGRAPH COMPANIES,**

Damage for mental suffering for breach of contract, 161.

Public nature, 386.

Form of action against, 386, 390.

Action by sender, 388.

Action by receiver, 389.

Compensatory damages, 390.

Damages for natural and contemplated consequences only, 391.

Distinction between tort and breach of contract immaterial, 391.

Proximate and certain damages, 392.

Losses sustained and gains prevented, 392.

Loss of sale or purchase, 392.

Loss of profits, 108.

Loss of contract of service, 396.

Loss of debt, 397.

Loss due to error in transmission, 397.

Loss of animal by sickness, 398.

Loss or gain on unlawful contract, 399.

Remote and speculative damages, 399.

Money transfer messages, 402.

Damages not contemplated, notice of purpose and importance of message, 403.

Cipher messages, 411.

Consequential damages for default in transmitting cipher telegrams, 80.

Abbreviations, 416.

Avoidable consequences, 416.

Exemplary damages against, 418.

**TIME,**

To which compensation may be recovered, 115.

**TITLE,**

To goods, damages for breach of warranty, 368.

**TORTS,**

Damages for direct consequences always recoverable, 44.

Consequential damages for, 65.

Damages for continuing torts, 116.

Damages, expenses of litigation, 132.

Loss of earnings, 130.

Impairment of earning capacity, 130.

Mental suffering in actions of tort, 149.

Exemplary damages for torts which are also crimes, 322.

Actions against telegraph companies, tort or contract, 386, 389, 390.

[The figures refer to pages]

**TRADE SECRETS,**

Liquidated damages for disclosure of, 212.

**TREES,**

Damages for destruction of, 500.

**TRESPASS,**

When a continuing or completed wrong, 119, 123, 124.

Damages for, 121, 499.

Permanent injuries, 121, 500.

Temporary injuries, 499.

Cost of repairing, 502.

Exemplary damages and penalties, 504.

Mental suffering for injury to realty and personalty, 159.

Interest as damages, 253.

**TRESPASS FOR MESNE PROFITS,**

For how long profits recoverable, 493, 496.

Costs of ejectment suit, 493, 497.

Damages, 494.

Deductions for improvements, 495.

Deductions for necessary expenses, 495.

**TROVER,**

See, also, "Conversion."

Interest as damages, 253.

Damages measured by value, 268.

Highest intermediate value in Pennsylvania, 292.

Exemplary damages, 321.

**U**

**USURY,**

Stipulations in evasion of usury laws, liquidated damages or penalties, 220.

**V**

**VALUE,**

Definition, 268.

How estimated, 269.

Market price merely evidence of value, 271, 274.

Market value, 271.

In nearest market, 272.

Of pass for life, 273 (note).

Of property for which there is no market value, 273.

Of property in course of manufacture, 273.

Of promissory note, 274.

Stocks, bonds, and other securities, 275.

Bills and notes, 275 (note).

When intrinsic value may be shown, 276.

Good will of established business, 276.

Peculiar to owner, 277.

[The figures refer to pages]

**VALUE—(Cont'd)**

- Pretium affectionis, 279.
- Time and place of assessment, 281.
  - Highest intermediate value, 284.
  - Objections to doctrine, 285.
  - Applications of rule, 288.
- Under legal tender act, 295.
- Medium of payment, legal tender, 295.
- Foreign currency, 298.
- Alternative medium of payment, 299.
- Mercantile securities, 299.
- Of contract to pay in commodities, 300.
- Of future care and support in action for death by wrongful act, 441.
- Annual value of real property, how estimated, 494.

**VERDICT,**

- Interest on before judgment, 239 (note).
- Setting aside, 341, 349.

**VINDICTIVE DAMAGES,**

- See "Exemplary Damages."

**W****WARRANTY,**

- Damages for breach of, that sheep are free from disease, 84.
- In sale of goods, damages for breach, 363, 365.
  - Warranty of title, 368.
- Covenant of, damages for breach, 515.

**WASTE,**

- Damages for, 508.

**WRONG AND DAMAGE,**

- Damages recoverable only when legal rights are violated, 9.
- Legal rights and wrongs, 10.
- Legal rights and wrongs, right not to be harmed, 10.
- Damage an essential element of legal wrongs, 10-15.
- Damage incident to authorized acts, 15.
- Lawful and unlawful conduct, 15.
- No such thing as injuria sine damno, 15.
- Damage incident to forbidden conduct, 20.
  - Public wrongs, 22.
- Conduct neither authorized nor forbidden, 24.
  - Malicious conduct, 25.
  - Conduct at peril, 26.
  - Negligent conduct, 26.
- Analysis of legal wrongs, 28.





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6. Intrinsic Aids in Statutory Construction.
7. Extrinsic Aids in Statutory Construction.
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4. Construction and Interpretation of Constitutions.
5. The Three Departments of Government.
6. The Federal Executive.
7. Federal Jurisdiction.
8. The Powers of Congress.
9. Interstate Law as Determined by the Constitution.
10. The Establishment of Republican Government.
11. Executive Power in the States.
12. Judicial Powers in the States.
13. Legislative Power in the States.
14. The Police Power.
15. The Power of Taxation.
16. The Right of Eminent Domain.
17. Municipal Corporations.
18. Civil Rights, and Their Protection by the Constitution.
19. Political and Public Rights.
20. Constitutional Guaranties in Criminal Cases.
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## TABLE OF CONTENTS

Chap.

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5. Rules of Property.
6. The Law of the Case.
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8. Authority of Precedents as Between the Various Courts of the United States.
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10. Decisions of Courts of Other States.
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4. Requirement of Writing.
5. Consideration.
6. Capacity of Parties.
7. Reality of Consent.
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## TABLE OF CONTENTS.

### Chap.

1. Of the Nature of a Corporation.
  2. Creation and Citizenship of Corporations.
  3. Effect of Irregular Incorporation.
  4. Relation between Corporation and its Promoters.
  5. Powers and Liabilities of Corporations.
  6. Powers and Liabilities of Corporations.
  7. Powers and Liabilities of Corporations.
  8. The Corporation and the State.
  9. Dissolution of Corporations.
  10. Membership in Corporations.
  11. Membership in Corporations.
  12. Membership in Corporations.
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## TABLE OF CONTENTS.

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1. Definition of Crime.
2. Criminal Law.
3. Classification of Crimes.
4. The Mental Element in Crime.
5. Persons Capable of Committing Crime.
6. Parties Concerned.
7. The Overt Act.
8. Offenses against the Person.
9. Offenses against the Person.
10. Offenses against the Habitation.
11. Offenses against Property.
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## TABLE OF CONTENTS.

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3. Preliminary Examination, Bail, and Commitment.
4. Mode of Accusation.
5. Pleading—The Accusation.
6. Pleading—The Accusation.
7. Pleading—The Accusation.
8. Pleading—The Accusation.
9. Pleading—The Accusation.
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## TABLE OF CONTENTS.

### Chap.

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1. Definitions and Division of subject.

#### Part 2.—APPOINTMENT AND QUALIFICATIONS.

2. Appointment in Court.
3. Place and Time of Appointment and Requisites Therefor.
4. Who may Claim Appointment as Executor.
5. Who may Claim the Right to Administer.
6. Disqualifications for the Office of Executor or Administrator.
7. Acceptance or Renunciation.
8. Proceedings for Appointment of Executors and Administrators.
9. Special Kinds of Administrations.
10. Foreign and Interstate Administration.
11. Joint Executors and Administrators.
12. Administration Bonds.

#### Part 3.—POWERS AND DUTIES.

13. Inventory—Appraisalment—Notice of Appointment.
14. Assets of the Estate.
15. Management of the Estate.
16. Sales and Conveyances of Personal or Real Assets.
17. Payment of Debts and Allowances—Insolvent Estates.
18. Payment of Legacies.
19. Distribution of Intestate Estates.
20. Administration Accounts.

#### Part 4.—TERMINATION OF OFFICE.

21. Revocation of Letters—Removal—Resignation.

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3. The Land Department and the Public Surveys.
4. The Relation Between Mineral Lands and the Public Land Grants.
5. The Relation Between Mineral Lands and Homestead, Timber and Desert Entries.
6. The Relation Between Mineral Lands and the Various Public Land Reservations.
7. The Relation Between Mineral Lands and Townsites.
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9. Definitions of Mining Law Terms.
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11. Who May and Who May not Locate Mining Claims.
12. The Location of Lode Claims.
13. The Location of Mill Sites.
14. The Location of Tunnel Sites and of Blind Lodes Cut by Tunnels.
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19. Adverse Proceedings and Protests Against Patent Applications.
20. Patents.
21. Subsurface Rights.
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23. Oil and Gas Leases.
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Equitable Estoppel.  
Election.  
Satisfaction and Performance.  
Conversion and Reconversion.  
Accident.  
Mistake.  
Fraud.  
Equitable Property.  
Implied Trusts.  
Powers, Duties, and Liabilities of Trustees.  
Mortgages.  
Equitable Liens.  
Assignments.  
Remedies Seeking Pecuniary Relief.  
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## TABLE OF CONTENTS.

### Chap.

1. History of Wills—Introduction.
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4. Agreements to Make Wills, and Wills Resulting from Agreement.
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6. Restraint upon Power of Testamentary Disposition—Who may be Beneficiaries—What may be Disposed of by Will.
7. Mistake, Fraud, and Undue Influence.
8. Execution of Wills.
9. Revocation and Republication of Wills.
10. Conflict of Laws.
11. Probate of Wills.
12. Actions for the Construction of Wills.
13. Construction of Wills—Controlling Principles.
14. Construction—Description of Subject-Matter.
15. Construction—Description of Beneficiary.
16. Construction—Nature and Duration of Interests.
17. Construction—Vested and Contingent Interests—Remainders—Executory Devises.
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19. Construction—Testamentary Trusts and Powers.
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## TABLE OF CONTENTS.

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3. The Nature and Characteristics of a Partnership.
4. Nature, Extent, and Duration of Partnership Liability.
5. Powers of Partners.
6. Rights and Duties of Partners Inter se.
7. Remedies of Creditors.
8. Actions Between Partners.
9. Actions Between Partners and Third Persons.
10. Termination of the Partnership.
11. Limited Partnerships.

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## TABLE OF CONTENTS.

### Chap.

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3. Bailments for Bailee's Sole Benefit.
4. Bailments for Mutual Benefit—Pledges.
5. Bailments for Mutual Benefit—Hiring.
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## TABLE OF CONTENTS

### Chap.

1. Definitions and General Principles.
2. Nominal Damages.
3. Compensatory Damages.
4. Bonds, Liquidated Damages and Alternative Contracts.
5. Interest.
6. Value.
7. Exemplary Damages.
8. Pleading and Practice.
9. Breach of Contracts for Sale of Goods.
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### Chap.

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2. Variations in Normal Right to Sue.
3. Liability for Torts Committed by or with Others.
4. Discharge and Limitation of Liability for Torts.
5. Remedies for Torts—Damages.
6. Wrongs Affecting Freedom and Safety of Person.
7. Injuries in Family Relations.
8. Wrongs Affecting Reputation.
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10. Wrongs to Possession and Property.
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## TABLE OF CONTENTS.

### Chap.

1. What is Real Property.
2. Tenure and Selsin.
3. Estates as to Quantity—Fee Simple
4. Estates as to Quantity—Estates Tail.
5. Estates as to Quantity—Conventional Life Estates.
6. Estates as to Quantity—Legal Life Estates.
7. Estates as to Quantity—Less than Freehold.
8. Estates as to Quality on Condition—on Limitation.
9. Estates as to Quality—Mortgages.
10. Equitable Estates.
11. Estates as to Time of Enjoyment—Future Estates.
12. Estates as to Number of Owners—Joint Estates.
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16. Title.

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## TABLE OF CONTENTS.

The Origin and History of the Admiralty, and its Extent in the United States.  
Admiralty Jurisdiction as Governed by the Subject-Matter.  
General Average and Marine Insurance.  
Bottomry and Respondentia; and Liens for Supplies, Repairs, and Other Necessaries.  
Stevedores' Contracts, Canal Tolls, and Towage Contracts.  
Salvage.  
Contracts of Affreightment and Charter Parties.  
Water Carriage as Affected by the Harter Act of February 13, 1893.  
Admiralty Jurisdiction in Matters of Tort.  
The Right of Action in Admiralty for Injuries Resulting Fatally.  
Torts to the Property, and Herein of Collision.  
The Steering and Sailing Rules.  
Rules as to Narrow Channels, Special Circumstances, and General Precautions.  
Damages in Collision Cases.  
Vessel Ownership Independent of the Limited Liability Act.  
Rights and Liabilities of Owners as Affected by the Limited Liability Act.  
The Relative Priorities of Maritime Claims.  
A Summary of Pleading and Practice.

## APPENDIX.

1. The Mariner's Compass.
2. Statutes Regulating Navigation, Including:
  - (1) The International Rules.
  - (2) The Rules for Coast and Connecting Inland Waters.
  - (3) The Dividing Lines between the High Seas and Coast Waters.
  - (4) The Lake Rules.
  - (5) The Mississippi Valley Rules.
  - (6) The Act of March 3, 1899, as to Obstructing Channels.
3. The Limited Liability Acts, Including:
  - (1) The Act of March 3, 1851, as Amended.
  - (2) The Act of June 28, 1884.
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## TABLE OF CONTENTS.

### Chap.

1. Introduction—What it Comprehends.
2. The District Court—Its Criminal Jurisdiction and Practice.
3. Same—Continued.
4. The District Court—Criminal Jurisdiction—Miscellaneous Jurisdiction.
5. The District Court—Bankruptcy.
- 6-8. Same—Continued.
9. The District Court—Miscellaneous Jurisdiction.
10. The Circuit Court—Original Jurisdiction.
- 11-12. Same—Continued.
13. The Circuit Court—Jurisdiction by Removal.
- 14-15. Same—Continued.
16. The Circuit Court—Jurisdiction by Removal—Original Jurisdiction of the Supreme Court—Other Minor Courts of Original Jurisdiction.
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18. Procedure in the Ordinary Federal Courts of Original Jurisdiction—Courts of Equity.
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## TABLE OF CONTENTS.

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#### Chap.

1. Nature, Creation, Classification.
2. Quasi Corporations—Liabilities, Elements, Counties, Property, etc.
3. Same—Continued.
4. Same—Continued.

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5. Municipal Corporations.
6. Their Creation—How—By What Bodies—Subject to What Restrictions, etc.
7. Their Alteration and Dissolution.
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13. Improvements.
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18. Taxation.
19. Actions.

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## TABLE OF CONTENTS.

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#### Chap.

1. General Nature of Torts.
2. Variations in the Normal Right to Sue.
3. Liability for Torts Committed by or with Others.
4. Discharge and Limitation of Liability for Torts.
5. Remedies.

### Part 2.—SPECIFIC WRONGS.

6. Wrongs Affecting Safety and Freedom of Persons.
7. Injuries in Family Relations.
8. Wrongs Affecting Reputation.
9. Malicious Wrongs.
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## TABLE OF CONTENTS.

### Chap.

1. Introductory.
2. Judicial Notice.
3. Questions of Law and Questions of Fact.
4. Burden of Proof.
5. Presumptions.
6. Admissions.
7. Confessions.
8. Matters Excluded as Unimportant, or as Misleading, though Logically Relevant.
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## TABLE OF CONTENTS.

### Chap.

1. Of Negotiability so far as it Relates to Bills and Notes.
2. Of Negotiable Bills and Notes, and their Formal and Essential Requisites.
3. Acceptance of Bills of Exchange.
4. Indorsement.
5. Of the Nature of the Liabilities of the Parties.
6. Transfer.
7. Defenses as against Purchaser for Value without Notice.
8. The Purchaser for Value without Notice.
9. Of Presentment and Notice of Dishonor.
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Appendix.

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## TABLE OF CONTENTS.

### Chap.

1. Forms of Action.
2. Forms of Action.
3. The Parties to Actions.
4. The Proceedings in an Action.
5. The Declaration.
6. The Production of the Issue.
7. Materiality in Pleading.
8. Singleness or Unity in Pleading.
9. Certainty in Pleading.
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Appendix.



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## TABLE OF CONTENTS.

### Chap.

1. Equity Pleading in General.
2. Parties.
3. Proceedings in an Equitable suit.
4. Bills in Equity.
5. The Disclaimer.
6. Demurrer.
7. The Plea.
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## TABLE OF CONTENTS.

### Chap.

#### Part 1.—ELEMENTARY JURISPRUDENCE.

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2. Government and its Functions.
3. Government in the United States.
4. The Unwritten Law.
5. Equity.
6. The Written Law.
7. The Authorities and their Interpretation.
8. Persons and Personal Rights.
9. Property.
10. Classification of the Law.

#### Part 2.—THE SUBSTANTIVE LAW.

11. Constitutional and Administrative Law.
12. Criminal Law.
13. The Law of Domestic Relations.
14. Corporeal and Incorporeal Hereditaments.
15. Estates in Real Property.
16. Title to Real Property.
17. Personal Property.
18. Succession After Death.
19. Contracts.
20. Special Contracts.
21. Agency.
22. Commercial Associations.
23. Torts.

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## TABLE OF CONTENTS.

### Chap.

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2. Formation of the Contract—Under the Statute of Frauds.
3. Effect of the Contract in Passing the Property—Sale of Specific Goods.
4. Effect of the Contract in Passing the Property—Sale of Goods not Specific.
5. Fraud, and Retention of Possession.
6. Illegality.
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Appendix.

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## TABLE OF CONTENTS.

### Chap.

1. Persons in International Law.
2. Existence, Independence and Equality.
3. Property and Domain.
4. Jurisdiction.
5. Diplomatic Relations.
6. Consular and Other Relations.
7. Treaties and Other International Agreements.
8. Amicable Means of Settlement of International Differences.
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10. Nature and Commencement.
11. Area and General Effect of Belligerent Operations.
12. Rights and Obligations During War.
13. Persons During War.
14. Property on Land.
15. Property on Water.
16. Maritime Capture.
17. Rules of War.
18. Military Occupation and Government.
19. Prisoners, Disabled and Shipwrecked.
20. Non-Hostile Relations between Belligerents.
21. Termination of War.
22. Nature of Neutrality.
23. Visit and Search.
24. Contraband.
25. Blockade.
26. Continuous Voyage.
27. Unneutral Service.
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